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CARGO, LIABILITY AND SELF-INSURANCE IN CONSIDERING UNIFORMITY OF INTERMODAL (OCEAN & LAND) CARRIER LIABILITY REGIMES IN THE UNITED STATES, CANADA AND INTERNATIONALLY

by

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Abstract

Although the absence of a uniform intermodal carrier liability regime in the U.S., Canada and internationally subjects shippers to uncertainty as to the presence and amount of compensation, intermodalism flourishes today due to the presence of insurance companies. Our paper examines the role of cargo, liability and self-insurance in the present fragmented legal reality governing multimodal carrier liability and explains insurance companies hesitation to consider uniform intermodal carrier liability rules. We also address the question of whether no fault insurance or abolition of liability or cargo insurance provides viable suggestions on the issue.

Keywords: intermodal transport, carrier liability, insurance.

Résumé

Même si l'absence d'un régime uniforme de responsabilité du transporteur intermodal aux États-Unis, au Canada et également à l'échelle internationale crée de l'incertitude quant à l'existence et au montant d'indemnisation de l'expéditeur, le transport intermodal se développe aujourd'hui avec succès grâce notamment aux compagnies d'assurances. Notre texte analyse le rôle de l'assurance-cargo, de l'assurance responsabilité et de l'auto-assurance dans ce contexte et explique l'hésitation des compagnies d'assurances à adopter un régime uniforme de responsabilité. Nous traitons également de la question de l'assurance sans faute et de l'abolition de l'assurance responsabilité comme solutions viables à la fragmentation actuelle de l'environnement légal des transporteurs intermodaux.

Mots-clés : transport intermodal, responsabilité du transporteur, assurance.

Introductory Remarks: Today, international shipments of goods in Canada, North America and worldwide are commonly transported by vessel, motor, train or plane (unimodal transport) or by a combination of different modes of transportation (multimodal transport)[1]. Although there is no consensus on the definition of intermodal transportation today, multimodal, 'combined', 'intermodal' or 'door-to-door' transport appear to be synonymous terms involving the shipment of cargo or people through more than one mode of transportation during a single, seamless journey[2].

While we see vestiges of intermodalism in antiquity, its global manifestation is traced back to the 1960s when the advent of container trade dramatically changed the transportation industry[3]. It is surprising to note that multimodal transportation did not develop in response to demands of the cargo interests, but due to competition and economic pressures on the transport industry[4]. Intermodal carriage has performed satisfactorily in the last half of the 20th century as logistics has grown to a profession integrating deregulation of transport services[5]. While once rare, multimodal transport is used even more today to

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[1] Although not as developed as unimodal and, specifically, motor transport, multimodal transport at the NAFTA (North American Free Trade Agreement) level is rapidly and steadily on the increase. *IMC Market Activity Report* (2000) online: Intermodal Association of North America Homepage (press releases) <http://www.intermodal.org/pr/pr-2nqtr.html> (last visited: 20th Oct. 2000). See also U.S., D.O.T., *The Freight Story* (2002) online: U.S. Department of Transportation Homepage <www.ops.fhwa.dot.gov/freight/publications/freight%20story/freight.pdf> (last visited: Nov. 27, 2002).

[2] W. Brad Jones, Richard Cassady, Royce O. Bowden, "Symposium on Intermodal Transportation: Developing a Standard Definition of Intermodal Transportation" (2000) 27 Transp. L. J. 345 at 349. This is the definition of multimodal carriage which, as limited to the transportation of goods, we will adopt in the present study. It does not refer to multimodal carrier liability rules which are quite complicated in practice as we are going to affirm later. Seemless means that transitions between modes occur smoothly with minimal delay. ***Ibid*** at 350. We will use the terms 'multimodal', 'intermodal' and 'combined' carriage interchangeably and give them the same meaning as herein explained.

[3] Samuel Robert Mandelbaum, "International Ocean Shipping and Risk Allocation for Cargo Loss, Damage and Delay" 5 J. Transnat' l L. & Pol'y 1 at 4 and Jonathan B.L.K. Jervell III, Anthony Perl, Patrick Sherry, Joseph S. Szyliowicz, "Symposium on Intermodal Transportation: Intermodal Education in Comparative Perspective" (2000) 27 Transp. L. J. 419 at 420. Containers are large metal boxes that can be loaded and sealed at the exporters plant, shipped by truck or train to the port, lifted onto a container ship by a dockside crane and stacked in specially designed slots. The container is then unloaded at destination. This occurs without directly handling the cargo inside the container. ***Ibid*** and Hugh M. Kindred, Mary R. Brooks, *Multimodal Transport Rules* (Hague: Kluwer Law International, 1997) at 12 and 5 and 12-13.

[4] The whole purpose and *raison d'être* of the international transportation industry is to serve international commerce. C. W. G. Wilson, "Through Transport: The Role of the Freight Forwarder" *Through Transport Seminar* (London: London Press Center, 1978) 1 at 4.

[5] Logistics was originally a military term used to describe the organization of moving, lodging and supplying troops and equipment. It was somewhat broader than transport since it covered everything needed to deliver troops and equipment to the right place at the right time and in the right condition. Modern business logistics is based on exactly the same concept and sets out to deliver exactly what the customer wants, at the right place, time and price. Very often transport is a major component of the 'supply-chain' which delivers to the customer the goods and services needed. *Transport, Logistics and All That* (2001) online: The Institute of

speed deliveries and reduce handling costs, serving the exploding expansion of trade at the regional and at the international level[6].

The principal instrument of shipment of goods in unimodal transport is the 'bill of lading' (BOL), or 'bill of loading' as it was once called[7]. Transport under a BOL is one of the oldest and most international forms of transportation of cargo[8]. This document may serve three functions: it is proof of the contract of carriage, it acknowledges receipt of the shipment by the carrier and, when negotiable, it is a document of title controlling possession of the goods in the hands of its holder[9]. 'Negotiable' BsOL are commonly used in sea carriage[10]. On the contrary, 'non-negotiable' or 'straight' bills are more frequently encountered in land transport[11].

Multimodal shipments worldwide frequently move under a 'Multimodal or Combined Transport Bill of Lading' (or 'through' BOL) that covers the 'door-to-door'

Logistics and Transport (ILT) Homepage <http://www.iolt.org.uk/whoweare/allthat.htm> (last visited: July 23, 2001).

[6] (World, per container throughput) : the number of movements taking place in port has grown from zero to 225.3 million between 1965 and 2000. Container traffic is expected to double between 1997 and 2006. UNCTAD, UNCTAD Secretariat, *Multimodal Transport: The Feasibility of an International Legal Instrument* (Génève: UNCTAD/SDTE/TLB/2003/1, 2003) at par. 6. See also "Why Integrated Transport Systems?" *OECD Observer* (1998) online: LEXIS (World ALLWLD). Thomas R. Denniston, Carter T. Gunn, Alfred E. Yudes, "Liabilities of Multimodal Operators and Parties other than Carriers and Shippers" (1989) Tul. L. Rev. 517 at 518.

[7] W. Tetley, *Marine Cargo Claims*, 3d ed. (Montréal: International Shipping Publications, 1988) at 215.

[8] ***Ibid***.

[9] The contract of transport is not an ordinary contract. Its specificity resides in:
a) the presence of three contracting parties: the shipper, the carrier and the consignee even though most of the time the former and the latter are the same persons, the consignee being shipper's agent.
b) the nature of the contract: the transport contract can be of a commercial nature, (this is often the case when the shipper is a merchant), or of a hybrid nature (when the shipper ships goods outside of commercial activities). Jean Pineau, *Le Contrat de Transport Terrestre, Maritime et Aérien*, (Montréal: Editions Thémis 1986) at 15 and 17.
c) being a contract of adhesion or a standardized contract. A standard form contract is a printed contract in which there are many blanks to be completed with information supplied by both parties. The speed with which the transport transaction is completed is a common feature to all modes of transport, especially where sea carriage is concerned. Being an adhesion contract, BOL provisions *usually favour the carrier*. William Tetley, "Evasion/Fraude à la Loi and Evasion of Law" (1994) 39 McGill. L. J. 303 note 4. See also UNCTAD, UNCTAD Secretariat, *Multimodal Transport: The Feasibility of an International Legal Instrument* (Génève: UNCTAD/SDTE/TLB/2003/1, 2003) at 15.

[10] For ocean BsOL as documents of title in Canada and world wide see the very often cited case *Champlain Sept-Iles Express Inc.* v. *Metal Coting Continuous Color Coat Ltd.* (1982), 38 O.R. (2d) 182 (Ont. Pr. C.). For the U.S. see "Carriers" *Am. Jur.* (2000) online: WESTLAW (TP-ALL).

[11] In Canada, truck BsOL are not documents of title. In the U.S., however, we may encounter an 'order' truck bill by way of exception. For instance, shippers of goods with destination Mexico occasionally request negotiable BsOL for protection against insolvent buyers in Mexico and, also, because of the extended transit times at the U.S.-Mexican border. Dr. Boris Kozolchyk, Gary T. Doyle, Lic. Martin Gerardo Olea Maya, *Transportation and Practice in North America*, (Tuscon, Arizona: National Law Center for Inter-American Free Trade, 1996) at 4.

journey or under multiple unimodal BsOL[12]. 'Through' BsOL do not differ from unimodal bills in their general characteristics except for the fact that they are generally negotiable documents "without which international trade would soon be brought to a standstill"[13].

Usually, though not always, the issuing carrier of a 'through' BOL agrees to be responsible for the cargo from the point of receipt to the point of final destination even if the damage occurs in segments of the journey not covered by him[14]. In this case, issuing carrier liability is determined by the regime applicable to the carrier where the damage actually occurs since the *damage* is *evident*[15]. When multiple unimodal BsOL are issued to cover the door-to-door journey and evident damage occurs, the carrier performing the stage in question will be held liable. In both cases of 'through' and multiple unimodal BsOL, the fate of the intermodal shipper depends on the portion of the intermodal route where the damage occurs and the liability principles applicable to it[16].

In case of *concealed damage* in the presence of a 'through' BOL, the terms of the bill contain most frequently, although not always, a presumption that the loss occurred on the ocean carrier leg of the transportation[17]. Generally, when the issuer of the intermodal through bill accepts responsibility for the cargo from the point of origin to the point of final destination, then no matter where the loss occurred the cargo owner can hold the issuing

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[12] William Tetley, *Marine Cargo Claims*, 3d ed. (Montréal: International Shipping Publications, 1988) at 927. The denomination 'through bills' is also used for unimodal successive carries. For instance, the 'pure ocean through bill of lading' and 'ocean through bill of lading' involve successive ocean carriers. ***Ibid***. This type of 'through' bills will not retain our attention.

[13] William J. Coffey, "Multimodalism and the American Carrier" (1989) 64 Tul. L. Rev. 569 at 588-589. This is also the case when 'through' bills only concern land intermodal transport.

[14] William Tetley, *Marine Cargo Claims*, 3d ed. (Montréal: International Shipping Publications, 1988) at 927. When the multimodal journey includes a sea leg of transportation, the sea carrier is almost always the issuing carrier. William J. Coffey, "Multimodalism and the American Carrier' (1989) 64 Tul. L. Rev. 569 at 586. In this respect, we have to note that the international multimodal channel in the U.S. and Canada is dominated by ocean carriers who have long taken a leadership role in intermodal transport worldwide constituting the clear channel captain. John C. Taylor, «Conflict, Power and Evolution in the Intermodal Transportation Industry's Channel of Distribution» (2000) 4/1/00 Transp. J. 517 at 519.

[15] William Tetley, *Marine Cargo Claims*, 3d ed. (Montréal: International Shipping Publications, 1988) at 928.

[16] Kurosh Nasseri, "The Multimodal Convention" 19 J. Mar. L. & Com. 231 at 233.

[17] Consequently, the cargo owner may recover from someone. Jack G. Knebel Savoie Blocker, "United States Statutory Regulation of Multimodalism" (1989) 64 Tul. L. Rev. 543 at 562, 563 and 567. Kurosh Nasseri, "The Multimodal Convention" 19 J. Mar. L. & Com. 231 at 233. Concealed damage is damage produced during the multimodal journey when it cannot be determined in what stage of the journey the damage actually occurred. This may be the case when the carrier ships sealed containers where he cannot verify the condition of the goods therein contained. Proof of receipt of goods in good condition makes part of the *prima facie* case the shipper has to make against the carrier in case of damaged goods. William Tetley, *Marine Cargo Claims*, 3d ed. (Montréal: International Shipping Publications, 1988) at 142. In the present study we oppose 'concealed damage' to 'evident damage' since, in the latter case, it is obvious in what stage of the journey the damage took place.

carrier liable for the damage[18]. However, the issuing carrier is entitled to benefit from liability provisions applicable to his leg of the transportation[19]. When non-through BsOL are issued, the cargo owner may not always be able to establish which, if any, of the carriers received the cargo in good condition and delivered it damaged (shipper *prima facie* case)[20]. Thus, the cargo owner may not be able to recover from any carrier for the damage[21].

In reality, multimodal transportation today is almost entirely the domain of the international freight forwarding industry[22]. Freight forwarders or multimodal transport operators[23] agree to be responsible for the complete movement of the goods and may carry the goods on their own vehicle for one stage of the journey or, simply procure performance of the entire contract through sub-contracting with other carriers[24]. They arrange for the door-to-door transport of goods and act as principals (contracting carriers) vis-à-vis shippers or as their agents in sub-contracting with performing carriers who actually transport shipper's goods[25]. While liability of unimodal carriers is governed by various conventions and national laws, freight forwarder liability is not subject itself to any

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[18] Jack G. Knebel Savoie Blocker "United States Statutory Regulation of Multimodalism" (1989) 64 Tul. L. Rev. 543 at 563-564.

[19] See ***ibid*** at 563 and doctoral thesis of Nicole Lacasse, *International Multimodal transport of Goods. Comparative Study of Canadian and French Laws* (D. Jur. Thesis, University of Paris 1, 1988) [unpublished: archived at the University of Nantes under micro-fiche number: 88.57.06285/88] at 78 for the case of the ocean carrier.

[20] Jack G. Knebel, Savoie Blocker, "United States Statutory Regulation of Multimodalism" (1989) 64 Tul. L. Rev. 543 at 562. Also, if the carrier makes reservations on the BOL as to the description of the goods made by the shipper or the shipment in general, shipper *prima facie* case is not established.

[21] ***Ibid***.

[22] *Multimodal Liability: Extracts from a Statement by the CIFFA Seafreight Committee* (1998) online: Forwarder Law Homepage <http://www.forwarderlaw.com/feature/multim.htm> (last modified: Nov. 26, 1999).

[23] Freight forwarders perform a number of services ancillary to the carriage (customs clearance of the goods, warehousing) and also the contract for carriage. Even though the terms 'freight forwarders' and 'multimodal transport operators' are, most frequently, used as synonymous and as such will be used in the present article, they have also created challenges in legislative and commercial issues. ***Ibid*** and *Mandate of CIFFA's Seafreight Committee* (1999) online: CIFFA abbreviations Homepage <http://www.ciffa.com/aboutciffa_mandateseafreight.html> (last visited: continuously). One should note that ship owners, charterers, terminal operators, inland depots, Non-Vessel Operating Carriers, air cargo operators and container lessors can also be freight forwarding agents. A.M. Stirling, "Insurance for Through Transport Operators" *Through Transport Seminar* (London: London Press Center, 1978) 1 at 2.

[24] Hugh M. Kindred, Mary R. Brooks, *Multimodal Transport Rules* (Hague: Kluwer Law International, 1997) at 5.

[25] Freight forwarders may act in their traditional role of shipper agents (paying freight charges, insurance, custom duties) or as principals (contractors) arranging the carriage in their own name. In the latter case, freight forwarders are liable to the shipper as carriers. William Tetley, *Marine Cargo Claims*, 3d ed. (Montréal: International Shipping Publications, 1988) at 692s. For the role of freight forwarders in French and Canadian law see the doctoral thesis of Nicole Lacasse, *International Multimodal transport of Goods.*

convention or national law but is rather determined by contracts[26]. Although freight forwarders may frequently undertake intermodal carriage of goods as principals, their contractual relationship with the shipper has tended to be that of an agency[27].

Even though, when acting as principals, freight forwarders are liable for evident or concealed damage wherever these might occur, they attempt to contract out as much responsibility as possible[28]. In this way, they try to shift their liability to the limited extent of liability imposed on the performing carrier, opting therefore for a fragmented, rather than a uniform, liability regime applicable to the intermodal carriage[29].

The absence of a uniform multimodal carrier liability regime defining one transport document, one liability regime and one compensation amount to be paid to the shipper in case of loss or damage occurring during the multimodal journey, has given rise to the commercial world's dissatisfaction with the myriad and inconsistent rules to govern it[30]. The multiple contractual relationships involved in multimodal transport of goods frequently lead to court rulings that tend to treat essentially similar disputes

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Comparative Study of Canadian and French Laws (D. Jur. Thesis, University of Paris 1, 1988) [unpublished: archived at the University of Nantes under micro-fiche number: 88.57.06285/88] at 110-240.

[26] *Multimodal Liability: Extracts from a Statement by the CIFFA Seafreight Committee* (1999) online: Forwarderlaw Homepage <http://www.forwarderlaw.com/Feature/multim.htm> (last modified: Nov. 26, 1999).

[27] C. W. G. Wilson, "Through Transport: The Role of the Freight Forwarder" *Through Transport Seminar* (London: London Press Center, 1978) 1 at 2-3.

[28] William Tetley, *Marine Cargo Claims*, 3d ed. (Montréal: International Shipping Publications, 1988) at 692s. and Hugh M. Kindred, Mary R. Brooks, *Multimodal Transport Rules* (Hague: Kluwer Law International, 1997) at 5-6.

[29] Hugh M. Kindred, Mary R. Brooks, *Multimodal Transport Rules* (Hague: Kluwer Law International, 1997) at 5 and at 6-7. E. C., (Eur.Com.), *The Economic Impact of Carrier Liability on Intermodal Transport* (2001) online: Europa Homepage http://europa.eu.int/comm/transport/library/final_report.pdf (last visited: Dec. 5, 2001). Jan Ramberg, *Unification of the Law of International Freight Forwarding* (2001) online: UNIDROIT Homepage <http://www.unidroit.org/english/publications/review/articles/1998-1.htm> (last visited: Jan. 10, 2001). Freight forwarders have traditionally avoided carrier liability by declaring that they do not act as common carriers but merely as shipper agents transferring, in this way, liability to individual carriers involved in multimodal transport. Evasive freight forwarder liability as a carrier, has qualified him as the 'legal Pimpernel Smith': "They Seek him here, They Seek Him There, Those Frenchies Seek Him Everywhere. Is He In Heaven, Is He In Hell, That Damned Illusive Pimpernel?". ***Ibid***.

[30] Thomas R. Denniston, Carter T. Gunn, Alfred E. Yudes, "Liabilities of Multimodal Operators and Parties other than Carriers and Shippers" (1989) Tul. L. Rev. 517 at 519. It is the 1980 United Nations Convention on International Multimodal Transport that had as an objective the definition of one transport document, one liability regime and one compensation amount. Marie Tilche, Andrée Chao, "Transport Combiné/Multimodal: Responsabilité de l'Opérateur" (1994) 2570 Bull. Transp. Log. 430 at 438. *United Nations Convention on International Multimodal Transport of Goods*, May 24, 1980, U.N. Doc. TD/MT/CONF/17 [hereinafter 1980 Multimodal Convention]. The 1980 Multimodal Convention is not in force today since only ten countries (Burundi, Chile, Georgia, Lebanon, Malawi, Mexico, Morocco, Rwanda, Senegal, Zambia) have acceded or ratified the document. Interview of the author with UNCTAD personnel (August 26, 2003).

inconsistently[31]. The ensuing complexity is overwhelming to small-business shippers since the need to use lawyers or additional cargo insurance to resolve these complexities may, in some cases, cost enough to make the shipment uneconomical[32].

Although not easy to achieve, uniformity of intermodal carrier liability rules presents considerable advantages. It involves elimination of the plethora of unimodal and domestic carrier liability rules and promotes trade by subjecting multimodal carriers to one applicable regime at the domestic, regional, or international level[33]. Despite the absence of data supporting this suggestion, a uniform intermodal liability regime is said to reduce litigation and transportation costs (especially costs associated with evidentiary enquiries and claims handling) promoting efficient multimodal operations[34].

It is to be noted, in this regard, that the contribution of intermodal transportation to the economic growth of a country is not insignificant[35]. When merely calculating the effect of improvements made to intermodal transportation we find that a one-time 10% increase in the basic characteristics of the transportation network due to intermodal transportation results in a permanent increase of the economy's growth rate[36]. More specifically, it was found that a simultaneous 10% increase in the frequency of transportation and the transportation network expansion as a result of intermodal

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[31] Thomas R. Denniston, Carter T.Gunn, Alfred E. Yudes, "Liabilities of Multimodal Operators and Parties other than Carriers and Shippers" (1989) Tul. L. Rev. 517 at 519. Under the present regulatory framework both the incidence and the extent of carrier liability may depend crucially on a) whether a loss can be attributed to a particular stage and mode of transport; b) which of a considerable number of potentially applicable rules and/or regulations is considered to be relevant by a court or arbitral tribunal in a given forum. UNCTAD, UNCTAD Secretariat, *Multimodal Transport: The Feasibility of an International Legal Instrument* (Génève: UNCTAD/SDTE/TLB/2003/1, 2003) at par. 10.

[32] Kurosh Nasseri, "The Multimodal Convention" 19 J. Mar. L. & Com. 231 at 233-234.

[33] Uniform international law is a boon to international commerce and thereby contributes substantially to creating conditions that foster both national and international economic growth. One of the greatest proofs of this is the European Union that, since 1957, has created a single market in goods and services among its member-states. William Tetley, "Uniformity of International Private Maritime Law-The Pros, Cons and Alternatives to International Conventions-How to Adopt to International Convention" (2000) Tul. Mar. L. J. 775 at 798.

[34] ***Ibid*** at 797 and *Intermodal Transport Liability* (1999) online: Interpool Homepage <http://www.interpool.com/tcl/_disc1/00000050.htm> (last visited: October 19, 2001) for litigation costs. "Europe's Cargo Insurance Lottery" *Am. Shipper* (1997) online: LEXIS (World, ALLWLD). UN (Economic and Social Council), Inland Transport Committee (Working Party on Combined Transport) *Possibilities for Reconciliation and Harmonization of Civil Liability Regimes Governing Combined Transport* (1999) online: UNECE Homepage <http://www.unece.org/trans/new_tir/wp24/documents/wp.24-99-2e.pdf> (last visited: Nov. 12, 1999) for transportation costs.

[35] Dr. Yuri V. Yevdokimov, "Measuring Economic Benefits of Intermodal Transportation" (2000) 27 Transp. L. J. 439 at 450.

[36] ***Ibid*** at 449.

transportation, generated 682 billion dollars in Canadian Gross Domestic Product over a period of 50 years (approximately 13.64 billion dollars per year)[37].

The interrelation of transport and the economy is easily explained. Transport is not an end in itself and its benefits depend on the facilitation of the economic activities [production, consumption, leisure (transport as a socio-economic phenomenon), dissemination] that it is intended to serve[38]. Improvements in intermodal transportation - and this is said to include improvements to liability principles governing multimodalism[39] and, thus, uniformity of intermodal liability rules - lead to the fall of total production costs and consumer prices, with empirical analysis showing that eventually consumers benefit more than producers from having an effective intermodal transportation in place[40]. This is probably because this type of transportation operates an increase in the volume of transported goods[41], a reduction in logistic costs of current operations, an expansion of the transportation network[42], and a better accessibility to input and output markets[43]. Reduced transit time, reduced vehicle maintenance, reduced pernicious environmental effects and operation costs are other benefits of intermodal transportation one has to consider[44]. All

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[37] ***Ibid***. Gross domestic product is defined as the total market value of all final goods and services produced in a country in a given year, equal to total consumer, investment and government spending, plus the value of exports, minus the value of imports. Gross Domestic Product includes only goods and services produced within the geographic boundaries of a country, regardless of the producer's nationality. Gross National Product does not include goods and services produced by foreign producers but does include goods and services produced by U.S. firms operating in foreign countries. *Gross Domestic Product* (2003) online: Insurers Words Homepage <http://www.investorwords.com/cgi-bin/getword.cgi?2240> (last visited: 22 Jan. 2003).

[38] Dr. Yuri V. Yevdokimov, "Measuring Economic Benefits of Intermodal Transportation" (2000) 27 Transp. L. J. 439 at 449.

[39] J.A. Raven "Through Transport-The Role of Trade Facilitation" *Through Transport Seminar* (London: London Press Center, 1978) 1 at 4.

[40] Dr. Yuri V. Yevdokimov, "Measuring Economic Benefits of Intermodal Transportation" (2000) 27 Transp. L. J. 439 at 441 and 449 for the details of the empirical analysis.

[41] This is due to the advent of containers, cargo consolidation, increase in the frequency of transportation, transport companies mergers. ***Ibid*** at 442-443.

[42] Empirical evidence shows that transportation costs increase at an increasing rate with increase in tonnage per trip but are increasing at a decreasing rate with increase in mileage. Since expansion of the network due to intermodal transportation is associated with an increase in the overall mileage, it eventually leads to a decreasing average total cost of transportation by pushing the volume of transportation toward an efficient scale. This phenomenon arises because of initial excess capacity of transportation vehicles and fixed facilities which is due to technical requirements. ***Ibid*** at 443-444.

[43] Intermodal transportation expands the market reach of businesses (accessibility to output) and permits access to a greater variety of specialized labour skills and different inputs such as capital, labour, transportation and natural resources (accessibility of input). ***Ibid*** at 444.

[44] ***Ibid*** at 440. In effect, through transport is designed and operated with a view to reducing total transport time from origin to destination through elimination of traditional delays between transport modes. Moreover, the opportunity for intermediate access to the transported goods is diminished through the transport of goods by containers. J. A. Raven, "Through Transport-The Role of Trade Facilitation" *Through Transport Seminar* (London: London Press Center, 1978) 1 at 4.

these features of through transport have important implications for and influences on international trade facilitation[45].

The economic advantages of a uniform multimodal carrier liability regime are also confirmed at the European level. Following reports made on the importance of the creation of a uniform multimodal carrier liability regime, the European Commission examined the costs of absence of such a regime and economic benefits of implementing a voluntary intermodal liability pattern[46]. In 2001, the Commission concluded that a harmonized multimodal carrier liability regime would reduce costs and facilitate trade at the European level and internationally[47].

Cargo, Liability and Self-Insurance: Despite the absence of a uniform intermodal carrier liability regime and the impossibility, at times, to forecast the presence and/or amount of shipper compensation, intermodalism flourishes today. This is attributed to the presence of insurance companies[48]. Commenting on cargo loss or damage and carrier liability without understanding insurance mechanisms and the economics of insurance is the equivalent of determining chess moves by rolling dice[49]. The economics of insurance make reference to the 'Law and Economics' doctrine.

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[45] J.A. Raven "Through Transport-The Role of Trade Facilitation" *Through Transport Seminar* (London: London Press Center, 1978) 1 at 4.

[46] "Trade Law Uniformity Remains out of Reach" *Ll. List Int'l* (1999) online: LEXIS (Transp. News). The European Commission set up, in 1995, a task force on intermodality which carried out consultations with the industry and, as a result of the report which it produced, intermodal liability had been earmarked by the Commission as an area which needed further examination. This was followed up by Commission's appointing a group of legal experts from European universities that produced a draft report dated July 1998. E. C. (Eur. Com.) Asariotis, Bull, Clarke, Herber, Kiantou-Pampouki, Morôn-Bovio, Ramberg, de Wit, Zunarelli, "*Intermodal Transportation and Carrier Liability*", final report, June 1999 (European Commission financed study; E. C. Contract NR. EI-B97-B27040-SIN6954-SUB). The Commission then invited representatives of various organizations to a 'hearing' on intermodal liability and the draft report was circulated with the papers for this hearing. In the minutes of the hearing was declared European Commission's commitment on this issue. ***Ibid***.

[47] European Commission Report, *The Economic Impact of Carrier Liability on Intermodal Freight Transport* (2001) online: Europa Homepage <http://europa.eu.int/comm/transport/library/final_report.pdf> (last visited: May 12, 2001). The report made a detailed economic analysis of costs due to the absence of a harmonized liability regime. It recognized the weaknesses of the present multimodal carrier liability regime, namely, uncertainty of the amount of compensation or identity of the responsible carrier and proposed harmonization of existing european laws on the issue. ***Ibid***.

[48] William J. Coffey, «Multimodalism and the American Carrier» (1989) 64 Tul. L. Rev. 569 at 578. William Driscoll, Paul B. Larsen, «The Convention on International Multimodal Transport of Goods» (1982) 57 Tul. L. Rev. 193 at 198-199. The author maintains that cargo and liability insurance are key factors in maintaining a workable system in intermodal transport.

[49] Jeffrey A. Greenblatt, "Insurance and Subrogation: When the Pie is not Big Enough Who Eats Last?" (1997) 64 Univ. of Chicago L. Rev. 1337 at 1355.

According to 'Law and Economics' principles, when risk prevention measures are less costly than the reduction of risk their adoption operates, one should adopt them[50]. When there is no means to prevent risk of loss or damage to the transported goods, one should either assume the risk, transfer it to a third party, or insure it[51]. The primary function of insurance is not to prevent the happening but to indemnify the party whose property is at risk, so that he will suffer no financial loss if his goods are destroyed or damaged[52]. It is this insurance option which, as applicable to carrier liability and cargo insurance, we will herein develop.

Transportation of cargo involves risk. Theoretically, the entire risk of loss or damage could be assigned either to the carrier or to the shipper. Risk is, in practice, allocated between them, with the possibility for each party to purchase insurance to cover its portion of the risk[53]. Today, it is carrier and shipper insurers that will, most often, take over settling of claims in case of damage to or loss of the goods in multimodal transport[54]. By acting as a means of risk-shifting, insurance companies represent a form of indemnification that provides security against loss to the insured. We frequently refer to three types of insurance when commenting on the transport of goods: cargo insurance, liability insurance, and self-insurance that we will examine as follows[55].

These three types of insurance are similar in that they all cover risks of loss or damage of the same goods. They differ in the identification of the contracting parties and of the covered risks[56]. Liability insurance covers carrier liability for loss or damage during carriage, while cargo insurance covers economic loss resulting from loss or damage to the goods. Self-insurance has developed in recent years and provides carriers and shippers with

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[50] Ejan Mackaay, *L'Analyse Économique du Droit* (Montréal, Québec: Éditions Thémis, 2000) at 173.

[51] We assume the risk when there is no other solution we can adopt. An example that illustrates deviation of risks to a third party is that of the inability of Canadian fishermen to fish because of exhaustion of stocks of fish in the oceans which is reflected on the community as a whole by means of governmental allocations to fishermen. ***Ibid***.

[52] John Isaacs, "Cargo Insurance in Relation to Through Transport" *Through Transport Seminar* (London: London Press Center, 1978) 1 at 1.

[53] Stephen G. Wood, «Multimodal Transportation: an American Perspective on Carrier Liability and Bill of Lading Issues» (1998) 46 Am. J. Comp. L. 403 at note 13.

[54] Ronald Gift Mullins, "Insurance" *J. Com.* (2000) online: WESTLAW (Newsletters).

[55] ***Ibid.***

[56] Eun Sup Lee, "Analysis of the Hamburg Rules on Marine Cargo Insurance and Liability Insurance" (1997) 4 ILSA J. Int'l & Comp. L. 153 at 156.

an alternative risk financing strategy that involves carriers or shipper's own assumption of risks in an attempt to lower insurance costs[57].

To overcome the complexities of international multimodal transport, shippers may need to have recourse to a lawyer or to purchase additional cargo insurance (shipper's option)[58]. Cargo insurance is typical in multimodal transport and constitutes a form of property insurance ordinarily paid promptly on proof of loss, without regard to liabilities which may be the subject of later disputed claims among insurers[59]. It can be purchased through an insurance broker that provides truck and/or marine cargo insurance[60]. This type of insurance is said to be provided by the shipper, and the premiums the latter pays are based on a multiplicity of factors such as individual shipper's losses and claims, method of shipment, type of packing, nature of cargo, the physical characteristics of the undertaken journey, carrier increase or decrease of liability limitations, and the 'pool' of catastrophe losses[61]. Cargo insurance may also be provided by the carrier if the shipper chooses to pay higher freight or purchases excess cargo insurance in return for full recovery guaranteed from the carrier in case of damage[62].

Most cargo insurance policies cover goods for 'all risks' during the entire door-to-door transport[63]. Despite its name, this 'all risks' policy may not provide full coverage of shipper's goods[64]. Limits exist as to the duration and extent of the insurance coverage.

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[57] U.S., D.O.T., *Cargo Liability Study* (August 1998) online: U.S. Department of Transportation Homepage <ostpxweb.dot.gov/policy/carmack/cgolia.pdf> (last visited: June 23, 2001).

[58] Kurosh Nasseri, «The Multimodal Convention» (1998) 19 J. Mar. L & Com. 231 at 234.

[59] Samuel Robert Mandelbaum, "Creating Uniform Worldwide Liability Standards for Sea Carriage of Goods" (1996) 23 Transp. L. J. 471 at 502. A cargo policy has been described as "fundamentally an agreement to pay a sum on the happening of an event; when that event has definitely taken place in accordance with the terms of the contract, the payment becomes due." Raymond P. Hayden, Sanford E. Balick, «Marine Insurance: Variety Combination and Coverages» (1991) 66 Tul. L. Rev. 311 at 319.

[60] "Valuable Lessons in Insuring Costly Cargo" *Bus. Times* (2000) online: WESTLAW (Newsletters).

[61] Henry Samuel, "Right Insurance Policy Vital to Protect your Exported Goods" *J. Com.* (1994) online: LEXIS (J. Com.) and Eun Sup Lee, "Analysis of the Hamburg Rules on Marine Cargo Insurance and Liability Insurance" (1997) 4 ILSA J. Int'l & Comp. L. 153 at 155 and note 5.

[62] Eun Sup Lee, «Analysis of the Hamburg Rules on Marine Cargo Insurance and Liability Insurance» (1997) 4 ILSA J. Int'l & Comp. L. 153 at 161-162.

[63] Henry Samuel, "Right Insurance Policy Vital to Protect your Exported Goods" *J. Com.* (1994) online: LEXIS (J. Com.).

[64] Defining the precise coverage afforded under a typical cargo policy is a three dimensional process. First, the policy perils clause will define the breadth of coverage in terms of fortuities insured. Second, the temporal aspect of coverage will determine for what duration of transit the coverage will apply. Third, the financial extent of recovery may be determined not only by the policy's limit but also by its average terms. Raymond P. Hayden, Sanford E. Balick, «Marine Insurance: Variety Combination and Coverages» (1991) 66 Tul. L. Rev. 311 at 320.

Consequently, shippers are rarely fully compensated in case of damage[65]. Because of cargo insurance, shippers in multimodal transport can collect immediately from cargo underwriters even when the ship that caused the loss has no defense[66]. Cargo insurers will then bring a subrogated claim against the liability insurer[67].

Carrier liability coverage differs from mode to mode and country to country but it is always limited to the extent of carrier 'legal liability'[68]. Cargo insurance will respond for the rest[69]. Liability insurance will always compensate a shipper in case carrier liability is clear[70]. In case of dispute or uncertainty, the resolution of financial responsibility for loss generally becomes a matter for negotiation and settlement between the insurance companies involved in the particular occurrence[71].

Liability insurance is mandatory for U.S. and Canadian motor carriers in order to obtain their operating license[72]. Contracting liability insurance may be a time-consuming, fastidious procedure involving filing of various documents and careful assessment of motor carrier history of losses upon which the amount of the premiums will be based[73]. Even if disparities still exist between the U.S. and Canadian insurance systems[74]

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[65] "Europe's Cargo Insurance Lottery" *Am. Shipper* (1997) online: LEXIS (World, ALLWLD).

[66] M.E. de Orchis, "Maritime Insurance and the Multimodal Muddle" (1982) 17 Eur. Transp. L. 691 at 704.

[67] ***Ibid.***

[68] "India: Mumbai Customs Notification Contrary to Trade Logic" *Bus. Line* (1999) (Hindu) online: WESTLAW (Newsletters). Lee R. Russ, *Couch on Insurance* 3d. ed (U.S.: Thomson Information Services, 1998) at note 8.5.

[69] ***Ibid.*** See also William J. Coffey, «Multimodalism and the American Carrier» (1989) 64 Tul. L. Rev. 569 at 574.

[70] William Driscoll, Paul B. Larsen, «The Convention on International Multimodal Transport of Goods» (1982) 57 Tul. L. R. 193 at 198-199.

[71] ***Ibid.***

[72] U.S. 1980 *Motor Carrier Act*, 49 U.S.C. 13906. The minimum insured liability amount for U.S. motor carriers equals 750.000$USD even though, in practice, most carriers exceed this coverage by buying 1$USD million liability insurance. Benjamin Armistead, "Working with Underwriters on Trucking Accounts" *Am. Ag. & Broker* (2000) online: WESTLAW (Newsletters). *TxDOT Expressway* (2003) online: Texas Department of Transportation Homepage <http://www.dot.state.tx.us/mcd/onestop/motor.htm#Insurance> (last modified: 2003) stating federal law requirements. The reason for the additional insurance is that the minimum required insurance limits often constitute insufficient protection for carriers and expose them to catastrophic losses. U.S. D.O.T., *Cargo Liability Study* (August 1998) online: U.S. Department of Transportation Homepage <ostpxweb.dot.gov/policy/carmack/cgolia.pdf> at (Chapter 4) (last visited: April 28, 2001). For Canada see Sec. 9(1)(g) and 9(2) of the *Motor Vehicle Transport Act*, R.S. 1985 c.29 (3rd Supp.). In Canada, motor carrier minimum liability insurance differs from province to province. On the insurance requirement in Québec see *Règlement sur les Éxigences Applicables aux Documents d' Éxpedition et aux Contrats de Location et de Services* (2001) online : Québec Government Homepage <http://www2.mtq.gouv.qc.ca/marchandises/camionnage/lourds/reglement_documents.pdf> (last visited: June 18, 2003) implementing the *Loi sur les Transports* L. R. Q. c. T - 12 a. 5 par. n and r.

[73] See the enlightening article of Benjamin Armistead, "Working with Underwriters on Trucking Accounts" *Am. Agent & Broker* (2000) online: WESTLAW (Newsletters) on computerized data available or needed to determine carrier situation before contracting liability insurance.

[74] I.e., while U.S. insurers are regulated by State governments, Canadian insurers are subject to both federal and provincial authorities. The Federal government regulates Mexican insurers. *Insurance Coverage Mires*

Canadian and U.S. truckers can freely cross each other's borders thanks to a mutually agreed upon insurance system[75]. This translates into the presentation of a 'yellow card' by both U.S. and Canadian truckers at the border, which guarantees free access to the neighboring countries territories[76].

Canadian and U.S. railways must carry liability insurance in order to obtain a certificate of fitness to operate in their respective countries[77]. U.S. and Canadian railways are self-insured up to a certain amount beyond which (for instance for valuable goods) they contract liability insurance[78]. Both U.S. and Canada have held that self-insurance qualifies, in legal terms, as adequate insurance in the field of transportation[79]. Thanks to mergers and agreements between U.S. and Canadian railways, cargo transported by rail goes through the border without any delays[80].

"Three Nation Truck Traffic: But Canada, U.S. and Mexico Seek Solutions" *J. Com.* (1997) online: LEXIS (World, ALLWLD).

[75] "Insurers Join Mexican Border Traffic Snarl" *J. Com.* (1999) online: LEXIS (World, ALLWLD).
To gain entry into the United States, a Canadian, as well as a Mexican motor carrier must file certificates of financial responsibility and have proof of liability insurance. To provide these, a Canadian insurer typically enters into an agreement with an American insurer under which the U.S. firm does the necessary filings for the Canadian company and provides proof of insurance. "Insurance Coverage Mires Three-Nation Truck Traffic; but Canada, U.S. and Mexico Seek Solutions" *J. Com.* (1997) online: LEXIS (World, ALLWLD). "NAFTA Officials, Insurers Drive to Resolve Truck Cover Disparity" *J. Com.* (1998) online: LEXIS (World, ALLWLD).

[76] The 'yellow card' is a document that guarantees liability coverage on each side of the border. "NAFTA Officials, Insurers Drive to Resolve Truck Cover Disparity" *J. Com.* (1998) online: LEXIS (World, ALLWLD) and Jennifer Rossi Auwarter, «A New Era of Motor Carrier Regulation : Open Borders and New Liabilities » *National Confectioners Logistics Council Summer Conference* (San Diego: National Confectioners Logistics Council, 2002).

[77] Canada: Sec. 92 of the 1996 *Canada Transportation Act*, S.C. 1996, c.10. U.S.: Interstate Commerce Commission (ICC) requirement Thomas Gale Moore, *Clearing the Track* (1996) The Cato Review of Business & Government Homepage <http://www.cato.org/pubs/regulation/reg18n2f.html> (last visited: April 11, 2001).

[78] U.S.: Interview of the author with a Railway Economy Expert (April 7, 2001). On the contrary, motor carriers usually do not have the asset base to self-insure. ***Ibid***. See also Margo D. Beller, "Deregulation Hightens Competition" *J. Com.* (1993) online: WESTLAW (Newsletters). Canada: Interview of the author with a Railway expert at the Canadian Transportation Agency (April 9, 2001). According to the information advanced the amount of self-insurance greatly varies from mode to mode and company to company, depending on the amount the company wants to set aside and the risks it wants to cover, and always needs to be approved by the Canadian Transportation Agency (CTA). We will further comment on self-insurance as follows. The CTA expert also notes that railway liability insurance policies in the U.S. can easily reach 300 million $USD dollars whereas in Canada these policies approximate, on average, 100$CAD million for passenger transport and 50 million $CAD for cargo transport.

[79] U.S. U.S., D.O.T., *Cargo Liability Study* (August 1998) online: U.S. Department of Transportation Homepage <ostpxweb.dot.gov/policy/carmack/cgolia.pdf> at (Chapter 3) (last visited: April 28, 2001) on the conditions upon which carriers can self-insure (mainly proof of financial condition). Canada: interview of the author with a railway expert at the Canadian Transportation Agency (April 9, 2001).

[80] Interview of the author with an Expert on Shipments of Dangerous Goods at Transport Canada (April 9, 2001). On the increase of rail way crossings see "In Good Shape" *Trib. Bus. News* (2000) online: WESTLAW (Newsletters). For motor and rail transport this always presupposes that there is no problem with customs at the border. Customs seem not to care about carrier liability insurance documentation but, rather, about whether the goods described in the BOL are conform with the Manifest of Shipment and whether the Carrier

Self-insurance is used by large carriers and shippers in order to respond to liability and cargo claims respectively and to reduce the costs associated with contracting cargo or liability insurance[81]. Small companies will not easily self-insure because they do not have significant amounts of cash available[82]. Despite its name and the frequent use of the terms 'insure(d)' or 'insurance' with respect to it - terms used mainly for convenience purposes - self-insurance does not involve insuring carriers or anyone, for that matter[83]. It actually refers to internal funding of potential risks by a carrier or group of carriers whereby reserves are set aside to *indemnify* shippers in case of potential claims[84]. There is no contract between the carrier or shipper and the insurance company but, rather, a policy to set aside funds owned by them that remain their property, without need to have recourse to outsiders[85]. The amount to be set aside mainly depends on the history and anticipation of claims[86].

Self-insurance presents the great advantage of cost-effective management of risks[87]. First, it avoids administrative overheads and underwriting profits that insurance

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is recognized (known). Interview of the author with the customs personnel in Montréal for the transport of goods between the U.S. and Canada (April 9, 2001). After the terrorist attack of September 11, 2001 in New York, delays in the border crossings between the United States and Canada have been noted due to safety measures taken.

[81] Shippers can self-insure freely whereas carrier liability insurance and, therefore, self-insurance, if they choose to self-insure for liability, is mandatory. Self-insurance is not specific to the field of transportation. Giant corporations have traditionally used self-insurance or self-insurance pools to avoid the existing marketplace. *Truckers Struggle as Insurance Costs Near Crisis Level* (2000) online: Truckings Electronic Newspaper Homepage <www.ttnews.com> (last modified: May 31, 2000). For the reasons why businesses have recourse to self-insurance see "Hard Market may Set Off Captive Explosion" *The National* (2001) online: WESTLAW (Newsletters).

[82] Even though there is no link between self-insurance and prosperity, one could argue that self-insurance is a sign of prosperity in the sense that a considerable amount of money is needed to pay claims. Interview of a self-insurance expert at Indiana University (April 5, 2001). However, ideas that promote self-insurance of middle-size businesses exist. "Beef Up Image" *J. Com.* (1986) online: WESTLAW (Newsletters). *Insurance Carriers Seek Liability* (2002) Superior Bulk Logistics Homepage online: superiorbulklogistics.com/DrivingForce /2002/June /page2.html (last visited: June 18, 2003).

[83] *Self Insurance* (2003) online: Indiana University-Office of Risk Management Homepage <http:www.Indiana.edu/~riskmgmt/SelfInsurance.htm> (last visited June 26, 2003). The majority of U.S. courts have held that self-insurance is not insurance at all. Lawrence I. Brandes, "Several Special Problems of Self-Insurance" (1987) 439 PLI/Comm 345 (WESTLAW-Tp-all).

[84] ***Ibid***. See also U.S. D.O.T., *Cargo Liability Study* (August 1998) online: U.S. D.O.T. Homepage <ostpxweb.dot.gov/policy/carmack/cgolia.pdf> at (Chapter 3) (last visited: April 28, 2001).

[85] Interview of the author with a self-insurance expert at Indiana University (April 5, 2001).

[86] *Self-Insurance Can Cut Health Care Costs-If you can Handle the Risk* (1999) online: Business Week Homepage <http:www.businessweek.com:/smallbiz/news/date/9909/f990903c.htm?scriptFrame> (last visited: April 4, 2001). Other factors, such as the domestic or international nature of the transportation or the nature of goods habitually transported, will also determine the amount to be set aside and will condition governmental (national agencies) approval of the carrier self-insurance plan (when insurance is a mandatory requirement for carriers).

[87] Sam Friedman, "Hard Market May Set Off Captive Explosion" *The National* (2001) online: WESTLAW (Newsletters). In certain cases, self-insurance may also offer tax advantages. *Captive Insurance Defined*

companies habitually carry. Second, it permits direct access to re-insurance markets and lucrative returns from the investment of 'premiums' that an insurance company would, otherwise, have retained. Finally, it leaves carriers free to manuscript their own policy to cover their potential liability. One could also validly argue that since a carrier who self-insures sets aside its own money to indemnify shippers, it has more interest in that there will be no greater damage to its cargo than if it had contracted liability insurance with a third-party[88].

The great risks associated with ocean carriage have rendered ocean carrier liability insurance necessary for all types of damage[89]. Protection and Indemnity Clubs (P&I Clubs)[90] cover the majority of ocean carriers worldwide (ship owner or charterer) to the extent of their 'legal liability', in return for premiums paid by the carrier which are usually based on a member's 'loss ratio', i.e. his statistical results reflecting loss experience over a given number of years[91]. The insured's 'loss ratio' is, therefore, a factor both cargo and liability insurers take into account in determining the amount of premiums[92].

In effect, cargo and liability insurers divide potential purchasers (shippers and carriers respectively) into groups, classifying them according to their probability of loss (expected losses) and the magnitude of losses they may incur[93]. Insureds with similar expected losses are placed in the same risk class so that each may be charged the same rate

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(1998) online: Insurance Bermuda Homepage online: <http:www.Bermuda-insurance.org/bim/home.nsf/pages/Define.htm> (last visited: Feb. 4, 2001).

[88] ***Ibid*** and "Iowa Train Derailment" *Gannett News Service* (2001) online: WESTLAW (Newsletters).

[89] F.N. Hopkins, *Business and Law* (Glasgow: Brown, Son & Ferguson Ltd., 1989) at 640.

[90] P&I Club insurance is widespread among ship owners. Approximately nine out of ten ocean-going ships are currently entered in a P&I Club. This type of insurance covers third party liabilities and expenses arising from owning ships or operating ships as principals. The major P&I Clubs belong to the International Group of P&I Clubs which exists to arrange collective insurance and reinsurance for them. *About the UK P & I Club* (1999) online: UK P & I Club Homepage <http://www.ukpandi.com/> (last visited: March 25, 2001).

[91] M. E. de Orchis, "Maritime Insurance and the Multimodal Muddle" (1982) 17 Eur. Transp. L. 691 at 704. In case of ship owners or other carriers starting a multimodal service and assuming liability door-to-door, P&I underwriters have difficulty in calculating insurance premiums since there is no loss experience to cite. One underwriter who was asked how the rate for multimodal transport was determined said: "I look out the window". ***Ibid*** at 707.

[92] See ***supra*** at 10 for cargo insurance.

[93] Kenneth S. Abraham, *Distributing Risk: Insurance, Legal Theory and Public Policy* (United States: Yale University Press, 1946) at 67. John Isaacs, "Cargo Insurance in Relation to Through Transport" *Through Transport Seminar* (London: London Press Center) 1 at 5 for cargo insurance. See also W. Kip Viscusi, "The Economics of Insurance Law" (1988) Northwestern Univ. L. Rev. 871 at 872-873. State laws limit distinctions insurance companies may draw in categorizing policyholders (i.e. distinctions based on race). It is generally argued that classification of insurance policyholders on immutable characteristics such as age, race and sex are particularly controversial and do not promote risk-averse behavior. ***Ibid***.

(premium)[94]. Expected losses are a prediction of the insured's actual losses[95]. However, actual losses vary from expected losses because calculations of the latter normally are not, and cannot be based on all relevant variables and because expected losses are only the predictable component of any individual's or enterprise's actual loss[96]. Random losses - losses occurring by chance- are taken into account by insurance companies but are only imperfectly predicted[97]. All insureds share the risk of random losses but pay premiums on an individual basis for expected losses[98]. In this way, the carrier and shipper are really protected against unusually large losses such as those arising out of a sinking of a vessel or other serious marine casualty[99].

Risk spreading of independent risks on a pool of insured persons is the principal characteristic of cargo and liability insurance as of insurance in general[100]. In this manner, insurance substitutes a reduced and certain cost for an important but uncertain one[101]. It is generally conceded today that such loss spreading by insurance is socially beneficial and does not undermine any remaining deterrence or penal aspects of liability law[102]. The premium of insurance enters into the final cost of the goods at the point of delivery[103].

In multimodal transport, liability insurance follows the principles of the fragmented carrier liability regime. If a freight forwarder is used by the shipper, the freight forwarders mandatory liability insurance does not always provide adequate coverage in

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[94] Kenneth S. Abraham, *Distributing Risk: Insurance, Legal Theory and Public Policy* (United States: Yale University Press, 1946) at 68. For further details on how insurers determine the premium rates see Ejan Mackaay, *L'Analyse Économique du Droit* (Montréal, Québec: Éditions Thémis, 2000) at 177-178 and 180-181. The more narrowly insurers can define risk pools, the more efficient the insurance is. To earn higher profits, insurers have an incentive to classify insureds according to their expected accident costs and to adjust premiums accordingly. By doing so, the insurer can offer low-damage insureds lower premiums, while charging high-damage insureds higher premiums. Avery Wiener Katz, *Foundations of the Economic Approach to Law* (New York: Oxford University, 1998) at 198.

[95] Kenneth S. Abraham, *Distributing Risk: Insurance, Legal Theory and Public Policy* (United States: Yale University Press, 1946) at 69.

[96] ***Ibid***.

[97] ***Ibid***.

[98] ***Ibid*** at 77.

[99] ***Ibid*** at 74.

[100] Ejan Mackaay, *L'Analyse Économique du Droit* (Montréal, Québec: Éditions Thémis, 2000) at 174 and 179.

[101] ***Ibid***.

[102] James M. Fischer, "The Presence of Insurance and the Legal Allocation of Risk" (1996) 5 Conn. Ins. L. J. 1 at 6.

[103] John Isaacs, "Cargo Insurance in Relation to Through Transport" *Through Transport Seminar* (London: London Press Center, 1978) 1 at 1.

case of damage[104]. If it is an ocean carrier who provides the intermodal journey, P&I Clubs generally cover door-to-door shipments up to the limits provided in the Hague and the Visby Rules, or certain other standard terms under international conventions or national laws[105]. In case the ship owner wishes to contract more onerous terms or stricter liability he must seek cover for the excess elsewhere[106]. Because shippers frequently do not know who is to blame (concealed damage) or the amount of compensation in case of loss or damage occurring during the multimodal journey, they are better off buying cargo insurance for their goods to compensate for the inadequacy of carrier liability insurance[107].

The need for cargo insurance in multimodal transport becomes imperative following transport deregulation because of the intensification of competition among carriers and between carriers and transport intermediaries over providing liability insurance for the whole multimodal journey[108]. In effect, under the heat of competition for cheaper freight charges and absent governmental control, some U.S. motor carriers 'neglect' safety standards and liability coverage[109]. To be certain against the eventuality of loss, shippers are strongly recommended to contract cargo insurance for their goods.

Do Insurance Companies Render Obsolete Uniformity Initiatives of Multimodal Carrier Liability? Authors argue that because of the presence of insurance companies, parties in multimodal transport have moved well beyond the need for a mandatory

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[104] Ian Putzger, *Forwarders Urged to Provide Enough Cover* (1997) online: CAN Homepage <http://web3.asia1.com.sg/timesnet/data/cna/docs/cna2394.html> (last visited: 04/06/01). In Canada i.e. only recently did the Canadian International Freight Forwarder Association (CIFFA) raise member requirement to carry liability insurance from 100.000$CAD to 250.000$CAD. *Qualifications* (2003) online: CIFFA Homepage <www.ciffa.com/become_qualifications.asp> (last visited: June 20, 2003). The same obligation to provide for liability insurance up to the amount of 750.000$USD exists in the U.S. James Giermanski, David Neipert, Jeffrey Kinsler, «The Re-regulation of Freight Forwarders in the U.S.A. and its Impact on the U.S.A.-Mexico Border» (2000) 9-WTR Currents: Int'l Trade L. J. 11 (LEXIS-Newsletters) (no pages). The insurance requirement is stated in U.S.C. Title 49, Subtitle 4, Part B, Chapter 139, Sec. 13906 as reported by *U.S. Code Collection* (2003) online: Cornell University-Legal Information Institute Homepage <http://www4.law.cornell.edu/uscode/49/13906.html> (last visited: Feb. 8, 2003).

[105] Liability coverage for door-to-door shipments is a policy P&I Clubs have adopted since 1973. A.M. Stirling, "Insurance for Through Transport Operators" *Through Transport Seminar* (London: London Press Center, 1978) 1 at 3.

[106] ***Ibid***.

[107] "New Cargo Pact with CAN Maritime Spices through Transport" *Ll. List. Int'l.* (2000) online: LEXIS (Transp. News) and Henry Samuel, "The Right Insurance Policy Vital to Protect your Exported Goods" *J. Com.* (1994) online: LEXIS (J. Com.).

[108] Margo D. Beller, "Deregulation Hightens Competition" *J. Com.* (1993) online: WESTLAW (Newsletters).

[109] ***Ibid***. While competition is fierce and profits are slim or non-existent, concerns intensify that spending on safety will be the first item reduced. U.S., U.S. DOT-Federal Highway Administration, *Key Freight Transportation Challenges-Safety* (2003) online: Department of Transportation Homepage <ops.fhwa.dot.gov/freight/publications/freight%20story/safety.htm> (last modified: Feb. 13, 2003).

international convention[110]. The fact that carrier liability is not only doubly but also triply insured by the forwarder, the agent and the carrier is a bonanza for the insurance industry and quite a reassuring fact for shippers (dual, triple or overlapping insurance)[111]. Moreover, with carrier and shipper consolidation, carriers and shippers can benefit from advantageous insurance terms and premiums following deregulation[112].

However, double or triple insurance to cover the same risk (overlapping insurance) increases transportation costs. Further, purchase of additional cargo insurance by shippers -if they have been wise enough to take out cargo insurance- or use of a lawyer to overcome the complexities of multimodal carrier liability regime, may cost enough to make the shipment uneconomical[113]. Shippers, particularly small shippers, may be overwhelmed by the additional cost[114]. It was probably for this reason that the then Chief of UNCTAD Trade Facilitation Section, Mr. Hans Carl, affirmed that shippers - particularly the smaller ones who lack the necessary sophistication to protect themselves - require introduction of a single and uniform multimodal transport liability regime which will eliminate these variances[115].

The present system is not only burdensome on shippers but also on carriers and cargo-liability insurers. Because cargo insurance does not cover all risks[116], or in case of suspicion of carrier negligence, shippers, or rather their insurers, have to deal with the multiplicity of legal regimes governing multimodal transport in settling or litigating their claims[117]. Even though litigation on insurance coverage and settlement of transport claims

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[110] William J. Coffey, «Multimodalism and the American Carrier» (1989) 64 Tul. L. Rev. 569 at 578.

[111] Richards Butler, "Trade Law Uniformity Remains out of Reach" *Ll. List. Int'l* (1999) online: WESTLAW (Newsletters). It is often the case that there is an overlap in the insurance coverage of goods in intermodal transport: four different persons may insure the same risk to the goods for a specific stage of a multimodal journey. Margo D. Beller, "Deregulation Hightens Competition" *J. Com.* (1993) online: WESTLAW (Newsletters).

[112] I.e., small shippers within a shippers association can take advantage of value-added services such as cargo insurance and inland transport provisions. "Save on Freight, Gain on Services with a Shippers Association" *Mang. Exp.* (2002) online: WESTLAW (Newsletters).

[113] Kurosh Nasseri, «The Multimodal Convention» (1998) 19 J. Mar. L. & Com. 231 at 234. "U.S., EU Seek Harmony in Transport Rules" *J. Com.* (1998) online: LEXIS (World, ALLWLD).

[114] ***Ibid***. From an insurance point of view, therefore, small shippers are disfavored by the current regime.

[115] Interview of the author with Hans Carl, President, at the time, of the International Multimodal Transport Association (IMMTA) Trade Facilitation Section (March 26, 2001) e-mail: hans.carl@infonie.fr. See also "Liability Limbo" *J. Com.* (2000) online : WESTLAW (Newsletters) and Sandra Speares, "Law: Plea for Implementation of Global Legislation on Multimodal Transport: Marine Insurance" *Ll. List. Int'l* (1999) online: WESTLAW (Newsletters).

[116] What is certain is that risks which arise from international transportation are not at the present time covered clearly or completely. C. W. G. Wilson, "Through Transport: The Role of the Freight Forwarder" *Through Transport Seminar* (London: London Press Center, 1978) 1 at 9.

[117] It should be noted, however, that the situation may not be qualified as tragic since carrier liability insurance is handled by legal experts who will, generally, not face extraordinary difficulties in dealing with

is generally settled, insurance companies can get entangled in very expensive disputes before the courts[118]. Courts are therefore left to resolve the legal complexities of multimodal transport and carrier liability insurance regimes[119]. To cover for the uncertainty of recovery, cargo and liability insurers raise insurance premiums[120].

Moreover, it is recommended to insurers to reinsure their risks with a super-insurer like Lloyd's (reinsurance) whose risks are more diversified than theirs or to form a consortium with other insurers so as to create a more diversified pool of risks[121]. Since cargo and liability insurers use one or several other insurers very often, they are burdened with additional costs which add to the complexity of the applicable rules[122]. This is claimed to be definitely better than to have gaps in the insurance coverage provided[123]. However, the unnecessary costs associated with the present system inevitably burden insurers and carriers, obstruct trade, and are finally borne by consumers who purchase transported goods[124].

Consequently, even if the status quo is said to benefit insurance companies, the granted advantage is not absolute[125]. The currently applicable insurance system burdens multimodal transport with unnecessary costs that uniformity of carrier liability regimes would, in all likelihood, avoid. Thus, the argument of efficiency in the rules of international trade and protection of small businesses persists today, and is worldwide in its reach[126].

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claims and identifying the applicable legal regime. It is still, however, a rather complicated affair to deal with cargo and liability insurance claims in multimodal transport. "Chequered History of a Legal System Bedeviled by Political Confrontation" (2000) Ll. List. Int'l. Sp. Rep. 19 (WESTLAW-Newsletters). According to Pr. Ramberg, an overriding common carrier regime could solve this problem. Jan Ramberg, *Unification of the Law of International Freight Forwarding* (1998) online: UNIDROIT Homepage http: <www unidroit.org/english/publications/review/articles/1998-1.html> (last visited: Mars 19, 2001).

[118] Michael F. Sturley, "Restating the Law of Marine Insurance: a Workable Solution to the Wilburn Boat Problem" (1998) J. Mar. L. & Com. 41 at 45. "Europe's Cargo Insurance Lottery" *Am. Ship.* (1997) online: LEXIS (World, ALLWLD). See also Jan Ramberg, *Unification of the Law of International Freight Forwarding* (1998) online: <http: www.unidroit.org/english/publications/review/articles/1998-1.htm> (last visited: March 19, 2001). See also "Liability Limbo" *J. Com.* (2000) online: WESTLAW (Newsletters).

[119] Jan Ramberg, *Unification of the Law of International Freight Forwarding* (1998) online: <http: www.unidroit.org/english/publications/review/articles/1998-1.htm> (last visited : March 19, 2001).

[120] "Liability Limbo" *J. Com.* (2000) online : WESTLAW (Newsletters). Michael F. Sturley, "Restating the Law of Marine Insurance: a Workable Solution to the Wilburn Boat Problem" (1998) J. Mar. L. & Com. 41 at 45.

[121] Ejan Mackaay, *L'Analyse Économique du Droit* (Montréal, Québec: Éditions Thémis, 2000) at 179.

[122] "Europe's Cargo Insurance Lottery" *Am. Ship.* (1997) online: LEXIS (World, ALLWLD).

[123] ***Ibid***.

[124] Michael F. Sturley, "Restating the Law of Marine Insurance: a Workable Solution to the Wilburn Boat Problem" (1998) J. Mar. L. & Com. 41 at 45.

[125] Kurosh Nasseri, «The Multimodal Convention» (1998) 19 J. Mar. L. & Com. 231 at 233.

[126] "U.S., EU Seek Harmony in Transport Rules" *J. Com.* (1998) online: LEXIS (World, ALLWLD). See also "Liability Limbo" *J. Com.* (2000) online : WESTLAW (Newsletters).

Mr. Chester Hooper reinforces this view by suggesting that all multimodal carriage should be governed by one set of laws[127]. The author argues that the uniformity and predictability that would flow from such a system "would encourage quicker settlements and more efficient insurance placement"[128]. In more economic terms, uniform intermodal carrier liability and proper allocation of risks between carriers and shippers, the latter to be examined as follows, reduce the risk born by the insureds and permit use of assets otherwise reserved to offset potential losses[129].

Constant pressure put on legislators and international organizations to adopt a uniform liability regime to apply to intermodal carriers and numerous efforts undertaken towards this direction, make present insurance mechanisms a 'provisional remedy' in securing the success of multimodalism. However, the security of the present reality and the uncertainty as to the effects of proposed changes sanction the saying: 'there is nothing more permanent than a provisional measure'. A permanent remedy is needed, nonetheless, to put an end to the legal complexities of the sector.

Interplay of Regulatory Policies on Carrier Liability and Insurance Premiums: Having addressed the question of whether uniformity initiatives merit consideration despite the presence of insurance companies, we now turn our attention to the effects of regulatory carrier liability policies on insurance premiums[130]. Addressing this issue will give us more insight into the effects of different regulatory policies on insurance companies and insurers' expected reaction to such policies.

The questions relevant to uniformity initiatives and insurance are how expensive insurance becomes and how the allocation of insurance costs between carriers and shippers is defined on the basis of undertaken uniformity initiatives[131]. Proper answers to these questions condition adoption of uniformity suggestions by insurance companies. What we need to achieve, in this regard, is an economically justified insurance cost in

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[127] Chester D. Hooper, «Legal Relationships: Terminal Owners, Operators and Users» (1989) 64 Tul. L. Rev. 595 at 595.

[128] ***Ibid.***

[129] Avery Wiener Katz, *Foundations of the Economic Approach to Law* (New York: Oxford University, 1998) at 196.

[130] Authors have raised the question of division of risks between carriers and shippers with respect to the multimodal carriage but also that of complete coverage of cargo owners risks. C. W. G. Wilson, "Through Transport: The Role of the Freight Forwarder" *Through Transport Seminar* (London: London Press Center, 1978) 1 at 9.

[131] Stephen Zamora, "Carrier Liability for Damage or Loss to Cargo in International Transport" (1975) 23 Am. J. Comp. L. 391 at 393. The author notes that insurance costs are included in the price of the goods.

exchange for an adequate degree of care undertaken by the carrier[132], and predictability as to the allocation of risks so that the item on the grocery shelf is not padded with unnecessary legal expenses[133].

One, however, could argue: why should we even bother about the cost of insurance and allocation of risks since, whatever the cost of insurance may be, it will be passed on from carriers to shippers or vice-versa and will be spread among policyholders?[134]. Through such a system of allocation of risks the overall cost of insurance remains the same whatever the change in the liability pattern may be.

In effect, if multimodal carrier liability was to increase, liability insurance premiums would naturally increase and cargo insurance premiums would decrease as cargo insurers would experience a higher level of recovery from the carrier[135]. Carriers would then seek to offset such additional expenses by a raise in freight charges[136]. This would lead, in turn, to a raise in cargo insurance premiums since carrier liability is an element contained within cargo insurance premiums. Such a raise would ultimately burden the consumer since transport costs are integrated in the price of the goods[137]. Inversely, (de)regulatory decrease of carrier liability would inevitably lead to an increase in use of cargo insurance and, therefore, of cargo insurance premiums. More cargo policies would then be sold because of the low liability limits and courts would probably not have to deal

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[132] Saul Sorkin, "Changing Concepts of Liability" (1982) 17 FORUM 710 at 717.

[133] M.E. de Orchis, "Maritime Insurance and the Multimodal Muddle" (1982) 17 Eur. Transp. L. 691 at 706. As Pr. Ramberg notes, what really matters is not where the risk of a certain insurable contingency is placed but, rather, a clear distribution of risks so that one can determine as accurately as possible where the risk lies. Jan Ramberg, "The Law of Carriage of Goods, Attempts at Harmonization" (1974) 9 Eur. Transp. L. 1 at 38. Opinion shared by De Wit Ralph, *Carrier Liability and Documentation in Multimodal Transport* (D. Jur. Thesis, Law Faculty of the Vrije Universiteit at Brussels, 1993) [published by Informa Law and is part of the Lloyd's Shipping Law Library] at 875.

[134] Opinion of maritime lawyer as reported by Samuel Robert Mandelbaum, "Creating Uniform Worldwide Liability Standards for Sea Carriage of Goods" (1996) 23 Transp. L. J. 471 at note 225. On the spreading of risk among policyholders see Jeffrey A. Greenblatt, "Insurance and Subrogation: When the Pie is not Big Enough Who Eats Last?" (1997) 64 Univ. of Chicago L. Rev. 1337 at 1355-1356.

[135] Samuel Robert Mandelbaum, "Creating Uniform Worldwide Liability Standards for Sea Carriage of Goods" (1996) 23 Transp. L. J. 471 at note 225 and David S. Peck, "Economic Analysis of the Allocation of Liability for Cargo Damage: the Case for the Carrier or is It?" (1998) Transp. L. J. 73 at 102.

[136] M.E. de Orchis, "Maritime Insurance and the Multimodal Muddle" (1982) 17 Eur. Transp. L. 691 at 706. Carrier insurance premiums are part of the freight structure. Brien D. Ward, "Admiralty: Failure to Deliver Cargo Does Not Constitute Unreasonable Deviation Under COGSA" (1986) 60 Tul. L. Rev. 849 at note 10.

[137] See Robert Force, "A Comparison of the *Hague, Hague-Visby* and *Hamburg Rules*: Much Ado about it?" 70 Tul. L. Rev. 2051 at 2087 for this argument with respect to the *Hamburg Rules*. Transportation costs include: freight, additional services (charge/discharge, declaration of value, weighing, cleaning and disinfecting the vehicle), expenses related to the contract of transport such as crew, repairs, provisions, bunkers, insurance premiums and taxes. Change of the itinerary, immobilization of the vehicle for reasons non-imputed on the carrier lead to a readjustment of the transport price. Marie Tilche, "Prix de Transport:

with interminable litigation since claims not clearly attributed to the carrier would not be worth pursuing[138]. Overall, whatever the shift in the carrier liability, liability and cargo insurance premiums will balance one another out.

Insurance mechanisms, however, do not always reflect the mathematical accuracy of the above-described allocation of risks mechanism because of the characteristics of cargo and liability insurers. In effect, liability insurers - mainly P&I clubs - are said to operate more cost-effectively, therefore, more easily absorbing losses than cargo insurers[139]. So, in case of increase of carrier liability from current levels, liability insurers - especially maritime insurers - may fear that the entire cost of insurance may not be passed on to shippers[140]. At the same time many shippers, especially large shippers who insure under favorable cargo insurance terms, may fear that the consolidation of risk onto carriers may provide the latter with an excuse to inflate rates[141].

On the other hand, limiting carrier liability (i.e. deregulation) will not necessarily result in a corresponding increase of cargo insurance premiums in the short or in the long run. In effect, defining cargo insurance premiums is not an exact science and its cost is far from being low. Cargo insurers do not have reliable statistics available so that premiums are set according to the account (whether it is a large or small policy, whether the insured is a new client etc.) as well as intuition[142]. What's more, carrier and cargo insurance are typically underwritten at different places and may respond to market pressures differently[143]. Consequently, whatever the change in the liability pattern may be, it is not certain that allocation of risks mechanisms will work at the benefit of liability or cargo insurers.

Délais et Incidents" (1999) 2814 Bull. Transp. L. 622 at 626. See also ***supra*** at 10 for carrier liability being an element of cargo insurance premiums.

[138] Interview of the author with CIFFA personnel (April 10, 2001).

[139] Eun Sup Lee, "Analysis of the Hamburg Rules on Marine Cargo Insurance and Liability Insurance" (1997) J. Int'l & Comp. L. 153 at note 2 and Stephen Zamora, "Carrier Liability for Damage or Loss to Cargo in International Transport" (1975) 23 Am. J. Comp. L. 391 at 394-395. The authors admit, however, that in the absence of sufficient empirical data, this conclusion cannot be confirmed with certainty. ***Ibid***.

[140] Stephen Zamora, "Carrier Liability for Damage or Loss to Cargo in International Transport" (1975) 23 Am. J. Comp. L. 391 at 394-395. See also David S. Peck, "Economic Analysis of the Allocation of Liability for Cargo Damage: the Case for the Carrier or is It?" (1998) Transp. L. J. 73 at 102 where the author notes that in case of carrier liability increase, increased freight rates may or may not offset reduced cargo insurance rates.

[141] Stephen Zamora, "Carrier Liability for Damage or Loss to Cargo in International Transport" (1975) 23 Am. J. Comp. L. 391 at 394-395.

[142] ***Ibid*** at 394. ***Supra*** at 10 on the 'objective' factors influencing insurance premiums.

[143] Unlike P&I coverage, cargo insurance is normally underwritten at the place of the origin of the goods and, therefore, most of the time there are two different markets involved. James H. Holenstein, "The Allocation of

One could argue that individual insurers and, thus, carriers and shippers are not interested in the above described overall picture of risk allocation in order to adopt a proposed change in the liability pattern but, rather, in how such a change will affect their individual situation. Even on this level, however, there is no uniform answer. Each insurer may react differently to a shift in the carrier liability. In effect, there are authors who argue that even though it is probable that, for instance, P&I clubs will raise their premiums and cargo insurers will lower them as a result of an increase in ocean carrier liability, it is uncertain whether the former will raise their freight rates consequently[144]. Freight raise depends on the competitive situation of each carrier[145]. It may be that there are many cases where carriers will not raise their rates to recapture their entire increase of insurer premiums[146]. Thus, one cannot generalize on this issue.

Overall, shifting liabilities will not necessarily shift costs correspondingly between carriers and shippers. The above-mentioned highly subjective elements vitiate supposedly absolute repercussion of carrier liability mechanisms and obstruct predictability of effects of a uniform multimodal carrier liability regime on insurance premiums.

It is normal, therefore, that insurers oppose change of the current liability pattern especially when the *status quo* is workable and profitable[147]. Uncertainty for the consequences of such changes on the insurance companies at the individual as well as at the industry level and the accommodating present reality withhold consideration for such initiatives[148].

The 'Law and Economics'[149] doctrine also provides a valid motive for our reasoning. In effect, there are some 'Law and Economics' authors who argue that more

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the Burden of Proof in Marine Fire Damage Cases" (1983) 50 U. of Chicago L. Rev. 1146 at 1168 and note 138.

[144] Robert Hellawell, "The Allocation of Risk Between Cargo Owner and Carrier" (1979) 27 Am. J. Comp. L. 357 at 366.

[145] ***Ibid*** at 363.

[146] ***Ibid*** at 366-367.

[147] Authors further state that these and other efforts to restructure distribution of risks between cargo and liability insurance have not gained momentum presumably because the insurance market is not yet prepared for such restructuring as these initiatives seem to suggest. Jan Ramberg, "Freedom of Contract in Maritime Law" (1993) L. M. C. L. Q. 178 at 186.

[148] Insurers are also skeptical about changing their business practices following a reform. Hugh M. Kindred, Ted L. McDorman, Mary R. Brooks, Norman G. Letalik, William Tetley, Edgar Gold, *The Future of Canadian Carriage of Goods by Water Law* (Halifax: Dalhousie University 1982) at 302.

[149] The Law and Economics doctrine does not merely regroup the branches of law that govern economic activities: international or domestic commercial activities, banks and currency, competition, enterprises. It goes much further than this. It founds various legal concepts on subtle economic givens and presents the economic perspective of legal notions. In this way, legal treatments of law are seen as particular manifestations of the interrelation between law and the economy. This permits the legal community to better

risks should be born by the party to the contract who is more able to mitigate damages inflicted by the harm-causing event (superior risk bearer test)[150]. This is an economics minded theory that answers law and economics cost-effectiveness preoccupations. Transposing this logic to the world of intermodalism, we wonder which one of the liability or cargo insurers is more capable of mitigating losses or damages to the transported goods.

'Law and Economics' suggests that the person who can predict and prevent the damage or loss on the one hand, or the one who can more cost-effectively bear the damage to or loss of the goods (risk bearer) on the other hand, should carry greater liability (superior risk bearer test)[151]. We will herein comment on both tests.

It is generally thought that a builder who builds many houses each year is in a better position to spread losses (risk bearer) than the individual buyer[152]. Transposing this line of reasoning to the carrier/shipper relationship, it can be argued that it is probably the carrier who is the best *risk bearer* since he can spread the risk of damage or loss to the many shippers he contracts with, in the same way the builder does when contracting with many buyers[153]. However, most of the time, all damages affecting goods in transit are

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comprehend legal notions and expand its reasoning. For instance, comprehending how allocation of risks works out between carrier and shipper insurers provides a better comprehension of cargo and liability insurance but also the necessary basis for making appropriate suggestions on uniform liability rules. Ejan Mackaay, *L'Analyse Économique du Droit* (Montréal, Québec: Éditions Thémis, 2000) at 140 and at 9-10. Nancy J. Whitmore, "The Evolution of the Intermediate Scrutiny Standard and the Rise of the 'Bottleneck Rule' in the Turner Decisions" (2003) 8 Comm. L. & Pol'y 25 at 36.

The doctrine's basic assumption is that we ought to make our welfare on the basis of efficiency, that is cost-minimizing outcomes. Efficiency has been defined in many scientific ways but we will herein choose the following one: "A rule is efficient if it maximizes profits from market transactions". Leonard R. Jaffey, "Symposium: The Future of Law and Economics: The Trouble with Law and Economics" (1992) 20 Hofstra L. Rev. 777 at 787 and 779. Robert F. Blomquist, "Witches Brew: Some Synoptical Reflections on the Supreme Court's Dangerous Substance Discourse, 1790-1998" (1999) 43 St. Louis L. J. 297 at 462. See also Jason Scott Johnston, "Strategic Bargaining and the Economic Theory of Contract Default Rules" (1990) 100 Yale L. J. 615 at 615 and Chris William Sanchirico, "Deconstructing the New Efficiency Rationale" (2001) 86 Cornell L. Rev. 1003 at 1005. Another definitions of efficiency refer to the Pareto Optimum, (A state is optimum if any change would hurt at least one person, help no-one). ***Ibid***. This is the first and basic theorem of welfare economics and the core of the legitimacy of the market as an allocation mechanism. Simon Deakin, Jonathan Michie, *Contracts, Co-operation and Competition* (London: Oxford University Press, 1997) at 309.

[150] John Elofson, "The Dilemma of Changed Circumstances in Contract Law: An Economic Analysis of the Foreseeability and Superior Risk Bearer Tests" (1996) 30 Columbia J. of L. and Soc. Probl. 1 at 11-12.

[151] David D. Friedman, *Law's Order* (Princeton, U.S.A.: Princeton University Press, 2000) at 161.

[152] ***Ibid*** at 162. See also the argument that the ability to better mitigate damages depends on the availability of information (the insurer has of its client's business) and the uncertainty of this test. John Elofson, "The Dilemma of Changed Circumstances in Contract Law: An Economic Analysis of the Foreseeability and Superior Risk Bearer Tests" (1996) 30 Columbia J. of L. and Soc. Probl. 1 at 11-13.

[153] Authors argue that if we are to minimize transaction costs and, therefore, final price of the goods, losses should be allocated to the party who can most cheaply avoid them. David S. Peck, "Economic Analysis of the Allocation of Liability for Cargo Damage: the Case for the Carrier or is It?" (1998) Transp. L. J. 73 at 98. Michael F. Sturley, "Changing Liability Rules and Marine Insurance: Conflicting Empirical Arguments About Hague, Visby, and Hamburg in a Vacuum of Empirical Evidence" (1993) 24 J. Mar. L. & Com. 119 at 129-130.

settled between cargo and liability insurers who are both capable of spreading losses to their insureds and are, hence, both good risk bearers[154]. As a result, the proposed argument justifying greater liability to be borne by the carrier does not appear to be that solid at first glance.

It is also thought that liability insurers operate more cost-effectively and, therefore, more easily absorbing losses than cargo insurers[155]. This puts liability insurers in a better position (better risk bearers) to assume a higher degree of liability. Others, however, assert that liability insurance is more expensive than cargo insurance[156] so that, overall, it is hard to conclude whether it is the carrier or the cargo insurers who are the best risk bearers and can, therefore, assume a higher degree of liability[157].

What about the second 'Law and Economics' test on prediction and prevention of risks? It is generally argued that the party with control over some part of the production process is in a better position both to prevent and to predict losses[158]. This person may be the builder as in the above-mentioned example but, depending on the specific fact pattern, it may also be another person. To better illustrate our conclusion suppose that a professional photographer spends six months taking photographs in the Himalayas for a big magazine at a cost of a hundred thousand dollars. When he gets home he gives the film for development to the local supermarket that loses it. At first sight, liability lies with the supermarket that loses the entrusted good, the film. One can, however, validly argue that it is the photographer who is in a better position to prevent the loss and should, therefore, be held

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[154] In risk allocation we begin with the assumption that when a party is risk-averse and the other is risk-neutral, the risk-neutral party is the best risk bearer and the parties should allocate the risk to him. Between the insured and the insurance company, the latter is risk-neutral because its very business is the spreading of risk. Jeffrey A. Greenblatt, "Insurance and Subrogation: When the Pie is not Big Enough Who Eats Last?" (1997) 64 Univ. of Chicago L. Rev. 1337 at 1355-1357.

[155] ***Supra*** at 21.

[156] Robert Hellawell, "The Allocation of Risk Between Cargo Owner and Carrier" (1979) 27 Am. J. Comp. L. 357 at 367. Opponents of carrier strict liability argue that cargo insurance is less costly than liability insurance. The problem is that for all these arguments there is no statistical support. Stephen Zamora, "NAFTA and the Harmonization of Domestic Legal Systems: the Side Effects of Free Trade" (1995) Ariz. J. Int'l & Comp. L. 401 at 394.

[157] The party who can most cheaply avoid losses cannot easily be determined because of the multiplicity of liability regimes in multimodal transport and different characteristics of shipments. Michael F. Sturley, "Changing Liability Rules and Marine Insurance: Conflicting Empirical Arguments About Hague, Visby, and Hamburg in a Vacuum of Empirical Evidence" (1993) 24 J. Mar. L. & Com. 119 at 130-131. David S. Peck, "Economic Analysis of the Allocation of Liability for Cargo Damage: the Case for the Carrier or is It?" (1998) Transp. L. J. 73 at 98.

[158] David D. Friedman, *Law's Order* (Princeton, U.S.A.: Princeton University Press, 2000) at 162. When risk prevention measures are known, as is the case of the example we will herein use, their adoption depends on whether they are cost-effective, this means to say, whether the cost of their adoption is lower than the reduction of risk they operate. Ejan Mackaay, *L'Analyse Économique du Droit* (Montréal, Québec: Éditions Thémis, 2000) at 173.

liable. In effect, knowing the value of the film, the photographer could have avoided the damage by taking the film to a specialist film lab and making sure that the proprietor realizes what they are[159]. As a result, the person who is in the best position to prevent the loss is the photographer[160].

In the transport contract, one could assert that it is generally the carrier who has better control of the goods in transit and is, therefore, in a better position to prevent their damage or loss. In effect, it is the carrier who is the guardian of the transported goods, is aware of their nature and knows the measures to be taken in this respect considering the perils to be confronted at sea. The situation is quite similar to that of the supermarket that holds and loses the photographer's film. However, we have seen that the photographer may be considered liable too, since he is aware of the value of the film and can reasonably predict potential damage to it but does not take all the necessary precautions to avoid it. In the same way, there are cases where the shipper (for instance under the 'shipper fault' liability exception) or other parties may be considered liable for not taking all necessary precautions to insure goods safety whenever such precautions are reasonably foreseeable by him/them. Consequently, one cannot draw a general conclusion on what party, whether it is the carrier or the shipper, is better situated to predict and prevent damage. The answer to this question depends on a case-by-case analysis.

We conclude that, overall, one cannot draw general conclusions as to what party to the transport contract is the best risk bearer or most apt to predict and prevent damages. As a result, there cannot be a generalized answer as to which party can more easily assume a greater degree of liability when reasoning on economic terms so as to justify an eventual increase or decrease in the degree of liability. Hence, we cannot talk about a most cost-effective allocation of risks in the transport contract.

Other suggestions: It has been argued that the solution to multimodal transport complexities does not lie 'in a new multimodal regime but in a new insurance regime'[161]. In this way, some people opine that if all risk of damage or loss were placed on one party, either the carrier or the shipper, dual or overlapping insurance, the necessity for cargo or

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[159] David D. Friedman, *Law's Order* (Princeton, U.S.A.: Princeton University Press, 2000) at 161-162.
[160] ***Ibid*** at 162.
[161] Tony Young, *Position Statement on Multimodal Liability* (1999) online : CIFFA Homepage <http :www.ciffa.com/currentissues_transportlaw_multimodal.html> (last visited: Nov. 30, 2001).

liability insurance (depending on the adopted solution) and subrogation actions between insurers, reputed to be so very costly, would be eliminated[162].

Abolishing carrier liability insurance and, therefore, carrier liability as a whole has never received serious support mainly because of the fact that the carrier would have no incentive to take adequate measures to protect cargo[163]. Some authors have argued that it is liability insurance that should be abolished and not a person's liability since insurance lessens the incentive of exercise of care of the liable person and/or victim by assuming the burden of loss in the event of damage or injury[164]. Although both these views may have a certain merit they should not be viewed as absolute. The carrier, as any insured person, has an incentive to take care of his cargo irrespective of the presence of liability or liability insurance since damages due to his lack of care will cause him loss of business and interruption of otherwise smoothly running transport operations resulting in further expenses[165]. It is, thus, competition that creates the incentive for carriers to care for cargo and not, necessarily or exclusively, the presence of liability or liability insurance.

If we want to avoid the traditional twins (cargo and liability insurance) we can opt for elimination of cargo insurance through increase of carrier liability. The same argument of remoteness of this solution from present reality could be made in this regard. Moreover, in such a case, cargo insurance may be reduced but will not be eliminated. In effect, the shipper will still use cargo insurers because payment is prompt, the cargo owner

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[162] "Chequered History of a Legal System Bedevilled by Political Confrontation" (2000) Ll. List Int'l. Sp. Rep. 19 (WESTLAW-Newsletters) on cargo insurance becoming obsolete if carrier liability were to be extended. For the opposite view see Jan Ramberg, "The Law of Carriage of Goods, Attempts at Harmonization" (1974) 9 Eur. Transp. L. 1 at 39-40. ***Supra*** at 17 for overlapping or dual insurance.

[163] David S. Peck, "Economic Analysis of the Allocation of Liability for Cargo Damage: the Case for the Carrier or is It?" (1998) Transp. L. J. 73 at 100. On this proposal being a utopian idea see Jan Ramberg, "The Law of Carriage of Goods, Attempts at Harmonization" (1974) 9 Eur. Transp. L. 1 ar 41. M. R. Th. Sarassin, "La Signification de l'Assurance sur Facultés en Cohésion avec le Postulat d'une Répartition Équilibrée du Risque de Transport entre le Propriétaire des Marchandises et le Transporteur » (1973) 8 Eur. Transp. L. 350 at 356-357. Every time such a proposal would be made, negotiators would discard it as utopian, thinking it would lead carrier to lack of care for the cargo.

[164] Jeffrey A. Greenblatt, "Insurance and Subrogation: When the Pie is not Big Enough Who Eats Last?" (1997) 64 Univ. of Chicago L. Rev. 1337 at 1357-1358.

[165] ***Ibid*** for an analogous reasoning made on the basis of personal injury insurance. Accentuated carrier competition following transport deregulation is a more realistic motive than fear of liability for carriers to be attentive of the cargo. Jan Ramberg, "The Law of Carriage of Goods, Attempts at Harmonization" (1974) 9 Eur. Transp. L. 1 at 39 and Jan Ramberg, "Freedom of Contract in Maritime Law" (1993) L. M. C. L. Q. 178 at 191. Mr. David Peck is much more explicit on this point. He argues that losses due to carrier fault are not profitable for carriers because they reduce profitability on the shipments. They are also not profitable for liability insurers because they increase liability insurance costs. They are, finally, not profitable for cargo insurers because their major controllable expense is cargo damages. The author goes even further suggesting that carrier liability is one of transaction costs and that we should not worry about regulating it because

can deal with a single insurer who may also provide coverage before and after liability insurance is effective[166]. Such a regime may, thus, present a gain for individual shippers but not for shippers as a class[167]. Finally, a raise in carrier liability falls, in the end, back upon the shippers of cargo.

Another solution that approximates the proposal on abolition of liability insurance is the institution of a no fault insurance system to compensate for damages to goods in multimodal transport[168]. Here, the elimination of liability insurance does not stem from elimination of carrier liability, as in our previous hypothesis, but from elimination of fault as the basis of carrier liability. This is not a no-liability insurance, it is a no-fault insurance replacing currently existing tort (fault-based) compensation of damages[169]. In effect, no-fault insurance permits carriers and shippers to be compensated by their insurance companies in the event of damage without respect to carrier or shipper fault, willful misconduct, gross negligence or presumption of liability which no longer constitute the basis of compensation[170]. Depending on the type of instituted no-fault insurance system, tort actions may be eliminated or preserved to a certain extent but the principle of this system is automatic compensation for sustained damages without regard to any person's fault[171]. When carrier and shipper insurance is no longer based on fault, cargo and liability

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competition effectively allocates liability. David S. Peck, "Economic Analysis of the Allocation of Liability for Cargo Damage: the Case for the Carrier, or is It?" (1998) Transp. L. J. 73 at 94, 98 and 101.

[166] David S. Peck, "Economic Analysis of the Allocation of Liability for Cargo Damage: the Case for the Carrier or is It?" (1998) Tul L. J. 73 at 100. The author also suggests that, under such a regime, dual insurance would be reduced but not eliminated. M. R. Th. Sarassin, "La Signification de l'Assurance sur Facultés en Cohésion avec le Postulat d'une Répartition Équilibrée du Risque de Transport entre le Propriétaire des Marchandises et le Transporteur » (1973) 8 Eur. Transp. L. 350 at 355 and 357. See also opinion of Sender-Augello made with respect to the 1978 *Hamburg Rules* as reported by Alan Schoedel, "Obstacles Seen to Convening New Cargo Liability Conference" *J. Com.* (1987) online: LEXIS (Newsletters) and Eun Sup Lee, "Analysis of the Hamburg Rules on Marine Cargo Insurance and Liability Insurance" (1997) 4 ILSA J. Int'l & Comp. L. 153 at 169. Saul Sorkin, "Changing Concepts of Liability" (1982) 17 FORUM 710 at 718.

[167] Samuel Robert Mandelbaum, "Creating Uniform Worldwide Liability Standards for Sea Carriage of Goods" (1996) 23 Transp. L. J. 471 at 489. It is probably for this reason that Pr. Tassel has noted in one of his articles on maritime law: "Tant que les enterprises d'assurances perdureront le mal sera limité mais qu'elles viennent à être mises en péril le remède aura été pire que le mal ». Yves Tassel, "La Spécificité du Droit Maritime" (1997) Annuaire de Droit Maritime et Océanique 143.

[168] As reported by Tony Young, *Position Statement on Multimodal Liability* (2001) online: CIFFA Homepage <http://www.ciffa.com/currentissues_transportlaw_multimodal.html> (last visited: Nov. 9, 2001). This is the position of David S. Peck, "Economic Analysis of the Allocation of Liability for Cargo Damage: the Case for the Carrier or is It?" (1998) Transp. L. J. 73 at 104.

[169] Lewis N. Klar, 'Tort and No-Fault' (1997) 5 Health L. Rev. No. 3, 2-8 at par. 3-4 (QUICKLAW-JOUR).

[170] David S. Peck, "Economic Analysis of the Allocation of Liability for Cargo Damage: the Case for the Carrier or is It?" (1998) Transp. L. J. 73 at 104. *No Fault Insurance* (2002) online: 4Insurance Homepage <http://www.4insurance.com/auto/nofault.asp> (last visited: Feb. 22, 2002).

[171] Whatever the type of no-fault insurance adopted, (pure no-fault, limited no-fault), insurers always maintain fault based criminal actions and premium penalties against the carrier. Craig Brown, *No-Fault Automobile Insurance in Canada* (Ontario: Carswell, 1988) at 1. In pure no-fault jurisdictions, as is the province of

insurance tend to converge so that, in the end, liability allocation is irrelevant because the parties bargain over who pays the insurance premium[172].

Mr. David Peck suggests, in this respect, that a no-fault insurance scheme in carriage of goods can be based on the parties' free contractual allocation of liability amongst themselves, attributing X per cent of the damage or loss to the carrier with the shipper retaining the rest of the liability[173]. He further argues that competition rather than law would force carriers to be more attentive of the cargo and that legislation could help them be more effective by requiring them to disclose all shipping accidents so that shippers can evaluate the precautions carriers take with respect to the cargo[174]. The author finally maintains that the system's benefits would outweigh its costs and complexities (i.e. multiplicity of individual contracts) since, after trial and error, standard practice would allocate to the carrier the percentage of its liability in most cases[175].

The present suggestion may be rejected as too remote from ground transport practice which is based on cargo and carrier liability (fault) insurance and contractual definition of it. However, because Mr. Peck's arguments seem rather convincing and because no-fault insurance systems are currently in place in other areas in the U.S. and Canada, more convincing answers should be given to counter the author's arguments.

Proponents of the no-fault insurance system argue that such a system permits reduction of insurance costs, efficiency, timeliness and fairness of compensation, elements to be opposed to the costly, adversarial, unfair and frequently arbitrary fault-based system[176]. They note, more specifically, that no-fault insurance favors speedy settlement of claims without need for lawyers, courts, delays, judges and juries since it is the insurance company that automatically pays for damages[177]. This results in reduction of insurance

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Québec for automobile accidents, the victim is compensated for any injury but denies recourse to any tort actions. ***Ibid***. and Robert Astroff, "Show Me the Money" (1996) 5 Health L. Rev. No. 3, 9-17 (QUICKLAW-JOUR). In limited no-fault jurisdictions the tort system remains in place for outcomes not included as automatically compensable. Robert Astroff, "Show Me the Money" (1996) 5 Health L. Rev. No. 3, 9-17 (QUICKLAW-JOUR).

[172] David S. Peck, "Economic Analysis of the Allocation of Liability for Cargo Damage: the Case for the Carrier or is It?" (1998) Transp. L. J. 73 at 105.

[173] ***Ibid*** at 104. The author adds that the carrier would provide a sliding rate schedule dependent upon the percentage of liability which it agreed to accept. The shipper would compare the list of rates with the cost of cargo insurance and choose the cheapest combination of freight and insurance. ***Ibid***.

[174] ***Ibid*** at 104 and at 96-97.

[175] ***Ibid*** at 105.

[176] Robert Astroff, "Show Me the Money" (1996) 5 Health L. Rev. No. 3, 9-17 (QUICKLAW-JOUR).

[177] *No Fault Insurance, The Basics* (2002) online: Insurance. Com Homepage online: <http://www.insurance.com/insurance_options/auto/auto_basics_no_fault_ins.asp> (last visited: April 4,

premiums because less cases end up in court (cost-effectiveness, litigation argument)[178]. No-fault insurance also provides compensation in all cases without regard to fault not excluding, at the same time, certain tort (fault-based) actions ('peaceful coexistence' with litigation)[179]. Moreover, the system is more just than current fault-based tort actions because the latter only punish parties at fault and, in certain cases, arbitrary decisions may withhold or limit compensation to some claimants while overpaying others (fairness argument)[180]. Finally, because of its flaws and the presence of liability insurance companies, the fault-based system loses its deterrent effect and cannot create disincentives with respect to undesirable conduct (deterrence argument)[181].

Opponents of no-fault insurance argue that this system is not without fault and that its considerable disadvantages make it non-appealing. Litigation costs, presumably avoided under no-fault insurance, are not really done away with since the time and effort insurers once spent defending litigation claims are now spent defending lawsuits brought by their own insureds for failure to pay no-fault benefits or/and determining whether thresholds, conditioning compensation, have been crossed[182]. Studies have also shown that under the Québec pure no-fault automobile insurance scheme there has been reported no significant difference in insurance costs when compared to fault-based systems in effect in other provinces (cost-effectiveness, litigation argument)[183]. A major Ontario study, the

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2002). *No Fault Insurance* (2002) online: 4Insurance Homepage <http://www.4insurance.com/auto/nofault.asp> (last visited: Feb. 22, 2002).

[178] *No Fault Insurance, The Basics* (2002) online: Insurance. Com Homepage online: <http://www.insurance.com/insurance_options/auto/auto_basics_no_fault_ins.asp> (last visited: April 4, 2002).

[179] ***Ibid***. See also Craig Brown, *No-Fault Automobile Insurance in Canada* (Ontario: Carswell, 1988) at 2 and ***supra*** note 171.

[180] Robert Astroff, "Show Me the Money" (1996) 5 Health L. Rev. No. 3, 9-17 (QUICKLAW-JOUR).

[181] ***Ibid***.

[182] *No Fault Insurance, The Basics* (2002) online: Insurance. Com Homepage online: <http://www.insurance.com/insurance_options/auto/auto_basics_no_fault_ins.asp> (last visited: April 4, 2002). Under a system of thresholds, the threshold is passed once a person exceeds a certain dollar amount in damages (monetary threshold) or meets defined criteria (verbal threshold i.e. severity of injury). Having a low monetary threshold is a bad idea and no-fault systems with such thresholds will just increase premiums without having much of an efficiency effect on the system. Some thresholds, however, are extremely severe requiring serious damage to goods. *A Message from the Coalition against No-Fault* (2001) online: BC Coalition of People with Disabilities Homepage <http://www.bccpd.bc.ca/commalert/nofault.html> (last visited: June1, 2001), Lewis N. Klar, 'Tort and No-Fault' (1997) 5 Health L. Rev. No. 3, 2-8 at par. 21-26 (QUICKLAW-JOUR) and Paul Eisenberg, *Wharton Study Explores no-Fault Insurance* (2000) online: Business Journal Homepage <http://www.bizjournals.com/philadelphia/stories/2000/04/10/focus3.html> (last visited: April 7, 2000).

[183] Release report of the Canadian Bar Association as reported by Lewis N. Klar, 'Tort and No-Fault' (1997) 5 Health L. Rev. No. 3, 2-8 at par. 24 (QUICKLAW–JOUR). Four Canadian provinces have no-fault schemes in the automobile accident area with Québec and Manitoba having a pure no-fault insurance system (***supra*** note 171) in the area of automobile accidents. ***Ibid*** at note 1. No U.S. state has adopted a pure no-fault

Osborne Report of Inquiry into Motor Vehicle Accident Compensation in Ontario indicated that under the Ontario system of tort, a move to no-fault would only result in a 5% reduction in expenses[184]. Further, experience with no-fault - especially in New Zealand - and its very high costs have led to a significant 'reform' of the scheme[185]. Authors conclude that the amount that would actually be saved by moving to a no-fault system is highly speculative. Moreover, studies have shown that the threat of tort liability does deter unreasonable conduct and further proof to this effect is provided by the fact that tort judgments can result in high liability insurance premiums (deterrence argument)[186]. What's more, in the area of automobile insurance, it seems that no-fault insurance has increased accidents because it has promoted driver carelessness[187].

Finally, and most importantly, it may be that a fault-based system is unfair because it always punishes persons at fault whereas no-fault insurance compensates notwithstanding a person's fault without, however, excluding the latter[188]. However, it is also true that the fault-based system provides for full compensation of damages whereas no-fault insurance does not since it is financially prohibitive to cover all possible losses[189]. Compensation thresholds established by no-fault insurers may be arbitrarily set, in the same way there can be arbitrary court decisions under the fault-based system[190]. The latter, however, constitute the exception rather than the rule since, in most cases, the issue of fault

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insurance scheme. *History of the No-Fault Concept* (1999) online: Consumer Watchdog Homepage <http://www.consumerwatchdog.org/insurance/fs/fs000160.php3> (last visited: March 3, 2000).

[184] Lewis N. Klar, 'Tort and No-Fault' (1997) 5 Health L. Rev. No. 3, 2-8 at par. 21(QUICKLAW-JOUR).

[185] ***Ibid*** at par. 25s. A letter to the *Herald* newspaper stating that the no-fault accident compensation scheme may have appeared attractive enough to New Zealanders at first but it did prove to be an abysmal failure in the end, seems to sum up the prevailing opinion on the issue. Roger Kerr, *New Zealand's ACC Scheme: Time for a Decent Burial* (1996) online: New Zealand Business Roundtable Homepage <www.nzbr.org.nz/documents/speeches/speeches-96-97/acc-hvcc.doc.htm> (last visited: June 15, 1997).

[186] Lewis N. Klar, 'Tort and No-Fault' (1997) 5 Health L. Rev. No. 3, 2-8 at par. 17.

[187] David Cummins, Mary Weiss, Richard Phillips, *The Incentive Effects of No-Fault Automobile Insurance* (1999) online: <http://fic.wharton.upenn.edu/fic/papers/99/9938.pdf> (last visited: Aug. 16, 1999). An empirical study of automobile accident fatality rates in all U.S. over the period of 1982-1994 revealed that no-fault insurance is significantly associated with higher fatal accident rates than the tort system. ***Ibid*** under 'Discussion'.

[188] It all depends on the type of no-fault insurance scheme adopted. ***Supra*** note 171.

[189] This is so, even assuming that there may be some financial savings to the system by moving away from tort to no-fault. Lewis N. Klar, 'Tort and No-Fault' (1997) 5 Health L. Rev. No. 3, 2-8 at par. 13 (QUICKLAW-JOUR). *A Failed Experiment: Analysis and Evaluation of No-Fault Laws* (1999) online: Consumer Watchdog Homepage <http://www.consumerwatchdog.org/insurance/fs/fs000218.php3> (last visited: March, 30 2000).

[190] *A Message from the Coalition against No-Fault* (2001) online: BC Coalition of People with Disabilities Homepage <http://www.bccpd.bc.ca/commalert/nofault.html> (last visited: June 1, 2001). The slogan for this Coalition is Threshold = No-Fault = No-Choice = No-Fairness. See also *No Fault Insurance, The Basics* (2002) online: Insurance. Com Homepage

is very straightforward and the conduct of the defendant clearly blameworthy by any reasonable standard (fairness argument)[191]. The same cannot be asserted for no-fault insurance thresholds since there are no-fault jurisdictions that may maintain very severe thresholds (permanent injury, disability) in order to compensate victims[192]. These may be some of the reasons why no-fault insurance systems, tried in many parts of the world, have been extremely unpopular or repealed since they have resulted in increased premium costs and reduced benefits[193].

Because defects exist in both fault-based and no-fault based insurance systems, we believe that the choice between the one or the other lies in a more extended reasoning of the said 'fairness' argument[194]. In effect, by punishing wrongful conduct and promoting reasonable behaviour the fault-based system promotes values such as fairness[195].

It is true that the costs of doing things fairly are not trivial[196]. Based on the previous analysis, however, it is not certain that a no-fault insurance system will provide the desirable result. What is to be expected under the no-fault insurance system? To have powerful and affluent claimants capable of buying more insurance coverage overpower smaller and powerless ones?[197] This is not our answer with respect to no-fault insurance or with respect to multimodal carrier liability at least where liability can be clearly attributed

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<http://www.insurance.com/insurance_options/auto/auto_basics_no_fault_ins.asp> (last visited: April 4, 2002).

[191] Lewis N. Klar, 'Tort and No-Fault' (1997) 5 Health L. Rev. No. 3, 2-8 at par. 15 (QUICKLAW-JOUR).

[192] In the U.S., for instance, Kansas no-fault automobile insurance has set such serious injuries as permanent disfigurement, bone fractures, permanent injury or permanent loss of a bodily function as threshold conditions in order to compensate victims. *You Were Injured in an Automobile Accident* (2002) online: My Counsel Homepage <http://www.mycounsel.com/content/personalinjury/hurt/auto/> (last visited: Mar. 2, 2002).

[193] *Choice No-Fault and other Recent Proposals* (2000) online: Consumer Watchdog Homepage <http://www.consumerwatchdog.org/insurance/fs/fs000285.pbp3> (last visited: March 3, 2002). *History of the No-Fault Concept* (1999) online: Consumer Watchdog Homepage <http://www.consumerwatchdog.org/insurance/fs/fs000160.php3> (last visited: March 3, 2000).

[194] See also concurring opinion of Lewis N. Klar, 'Tort and No-Fault' (1997) 5 Health. L. Rev. No. 3, 2-8 at par. 22 (QUICKLAW-JOUR).

[195] Other values promoted: common sense of rights, a common sense of duties, a demand for fair hearing, an aversion to inconsistency, a passion for equality of treatment, an abhorrence of illegality and a commitment to legality. H. J. Berman, *The Interaction of Law and Religion* (Nashville: Abingdon Pres, 1974) at 26 as reported by ***ibid***.

[196] H.W. Arthurs, "A Review of Advocacy and Dispute Resolution in the Ontario Automobile Insurance System" (1993) a report prepared by the Ontario Minister responsible for Automobile Insurance Review 1 at 11, as reported by Lewis N. Klar, 'Tort and No-Fault' (1997) 5 Health L. Rev. No. 3, 2-8 at par. 22 (QUICKLAW-JOUR).

[197] In *Peixeiro* v. *Haberman* [1997], 3 S. C. R. 549 (S. C. C.) the court noted that full compensation, justice, accident deterrence, safety and education goals of tort are not the aims of no fault-insurance. As reported by Lewis N. Klar, 'Tort and No-Fault' (1997) 5 Health L. Rev. No. 3, 2-8 at par. 22 (QUICKLAW-JOUR).

to a particular carrier (evident damage)[198]. We believe that justice and fairness should not be compromised for purely economic reasons. Eventual flaws in the thereby established system - fault-based system and multimodal carrier liability regime in the present case - leave margins for correction.

Conclusion: Although a uniform intermodal carrier liability regime is argued to be beneficial to carriers, shippers, their insurers and trade, the complicated multimodal legal reality and carrier, shipper, and insurer uncertainty as to the effects of instituted cross-modal and cross-country uniform rules advise caution in undertaking uniformity initiatives. It appears that only time and persistence in pursuing uniformity of intermodal carrier liability rules at the bilateral, regional and/or international level will lead to the desired objective. In this respect, institution of no fault insurance mechanisms or abolition of liability or cargo insurance seems to provide non-satisfactory solutions.

[198] ***Supra*** at 3 for evident damage. One could argue that no-fault insurance would be perfectly suited for covering damages due to concealed damage since, not knowing where the damage has occurred, the fairness argument fails in the absence of elements identifying the liable party. So, instead of presuming ocean or land carrier liability in case of concealed damage, as it is currently the case, no fault liability insurance should take effect. This is a very interesting idea that should be further examined within the uniformity context.